Com. v. T.W.

The attached writing sample was written as a final assignment for a criminal appellate procedure class with Professor Jules Epstein, Esq., Edward D. Ohlbaum Professor of Law, Temple University Beasley School of Law, and Adjunct Professor Meredith Zeitzer, Esq., Assistant Chief of the Municipal Court Unit, Defender Association of Philadelphia.

The writing sample is an appellate brief adapted from a real-world Philadelphia Court of Common Pleas juvenile case file, with certain identifying features altered. It is an evidentiary and sufficiency appeal from the trial court's denial of a motion to suppress physical evidence obtained after a *Terry* stop. The brief is written from the position of the Commonwealth.

The attached sample is the COUNTERSTATEMENT OF QUESTION(S) PRESENTED, COUNTERSTATEMENT OF THE CASE, and ARGUMENT section excerpted from the brief.

COUNTERSTATEMENT OF QUESTION(S) PRESENTED

A. Whether, after conducting an open-hand pat for weapons and not being able to eliminate the hard object felt as a weapon, a *Terry* frisk allows an officer, for his safety, to reach into a suspect's pocket for the limited purpose of discovering if that hard, unknown, object is a weapon?

(Answered in the affirmative by the court below)

B. Whether there is sufficient evidence for a possession with intent to deliver adjudication where a large quantity of controlled substances are recovered, the suspect possesses more than one substance, they were not prescribed to the suspect, and expert testimony confirmed those circumstances were demonstrative of an intent to deliver, even though neither a large amount of cash nor multiple cell phones were found?

(Answered in the affirmative by the court below)

COUNTERSTATEMENT OF THE CASE

Appellant was found in possession of liquid promethazine and twenty pills of Oxycodone not prescribed to him following an open-hand pat frisk and subsequent search, respectively. Following a hearing, Appellant was found guilty of possessing the substances with an intent to deliver and adjudicated delinquent. Appellant challenges his conviction on the basis that the trial court erred in denying the motion to suppress all physical evidence and there was insufficient evidence to support an intent to deliver adjudication. This Court should disagree.

(A) PROCEDURAL HISTORY

Appellant was charged with felony Possession with Intent to Deliver and misdemeanor Possession of a Controlled Substance and brought before the First Judicial District of Pennsylvania Domestic Relations - Juvenile Branch Court. An adjudication of delinquency hearing *In the Interest of T.W.*, docket number CP-51-JV-0001105-2018 commenced on July 10, 2018, in front of the Honorable Amanda Cooperman. Appellant stated his grounds for a motion to suppress and a hearing commenced on the facts. N.T. 07/10/2018 at 5:16-6:7. At the conclusion of testimony and argument, Hon. Cooperman denied the motion to suppress the physical evidence. *Id.* at 36:22-23. The hearing proceeded to trial where all relevant non-hearsay evidence was incorporated into the record along with the relevant paperwork; This included both Commonwealth exhibits C-1-A through C and Defense exhibit D-1. Once incorporated, Hon. Cooperman found Appellant guilty of possessing illegal narcotics with an intent to deliver and adjudicated him delinquent. *Id*. at 37:10-38:18. This appeal followed.

(B) STATEMENT OF FACTS

SUPPRESSION EVIDENCE

A high-speed pursuit and a foot chase

On, or about, June 19th, 2018, around 4:15 am, Officer Grant and his partner (Badge No. 2768) observed a silver Toyota make a U-turn and then a green Chevy followed. The officer turned his patrol car around to initiate a traffic stop when both cars drove down the street at high rates of speed. N.T. 07/10/2018 at 07:13-10:03. At that point, Officer Grant turned on his lights and sirens but both cars continued to drive recklessly, running several red lights. *Id*. at 10:03-25. The Chevy, trailing the Toyota, crashed and its two occupants, both males, ran from the car in the same direction. The Officers, now on foot, pursued the two men who fled from the Chevy. The Officers were no longer following the silver Toyota at that point since it was leading the caravan of cars and had not crashed. They lost the two males that fled. *Id*. at 11:12-12:15.

A vehicle stop on foot

The foot pursuit led the Officers to the corner of 20th and Susquehanna Street where they came upon the same silver Toyota involved in the initial pursuit. The Officers started a vehicle stop on foot. N.T. 07/10/2018 at 12:15-19. There were three occupants in the car: two females and one male, the Appellant. The females were in the front seats and the Appellant was in the rear driver's seat. All occupants were asked for their identification. *Id*. at 12:22-13:19. Appellant, instead of producing his identification (which he did not have), began to "blade his body" away from the Officer. *Id*. at 13:19-21. This meant, according to the Officer, that Appellant was turning his left shoulder away while simultaneously reaching into his pocket. *Id*. at 13:24-14:9. Appellant was instructed to stop reaching into his pocket but he did not comply. Fearing for his safety and concerned that Appellant may have a weapon, Officer Grant opened the rear driver's side door and ordered Appellant out of the car. *Id*. at 14:11-17, 15:16-16:10. The Officer's previous experience

with vehicle stops and the area of the stop, lead to his concern Appellant may have a weapon.[1] *Id*. at 14:17-15:15. Once outside of the vehicle, the officer conducted an open-hand pat down Appellant's pants when he felt a large, hard, unknown object in his left pants pocket. The officer removed a bottle of medicine labeled 'promethazine" from Appellant's left pants pocket. The prescription did not have Appellant's name on it. *Id*. at 16:9-18:10. Believing the bottle to be a controlled substance, the Officer placed Appellant under arrest. Incident to arrest, a search of Appellant was conducted. It produced a pill bottle with twenty white pills, later identified as Oxycodone. The bottle of medicine containing the white pills was also not prescribed to Appellant. *Id*. at 18:14-19:10, 19:17-22, 20:1-2.

TRIAL TESTIMONY

An expert opinion

Officer Alex DeLeon (Badge No. 4545), a five-year veteran of the force, was qualified as an expert before the court to testify to the intent element of the Possession with Intent to Deliver charge. N.T. 07/10/2018, Expert Testimony, at 1:1-5, 3:58-66. Assigned to the narcotics division, Officer DeLeon has been involved in raids, undercover narcotics investigations, and received DEA training on narcotics.[2] *Id*. 1:6-24. In his tenure, thirty to forty percent of the drug cases he handled involved oxycodone. Based on this, Officer DeLeon was qualified as an expert, uncontested by Appellant. *Id*. at 3:58.

[1] Officer Grant testified that in previous vehicle stops he has observed people reach, not comply when asked to stop reaching, and then have weapons or narcotics recovered. N.T. 07/10/2018 at 15:7-15. There had also been, on the same corner of the vehicle stop, a shooting three days prior in which five people were injured; The area was described as "high crime." *Id*. at 14:20-15:6.

[2] DEA training involved several issues, including but not limited to: drug courier routes, drug organization structure, drug smuggling, using social media to detect drug organizations, and addiction. N.T. 07/10/2018, Expert Testimony, at 2:32-45.

In his expert opinion, the Officer concluded that Appellant possessed the drugs *with the intent to deliver*. *Id*. at 3:62-66 (emphasis added). The officer based his expert opinion on the following facts:

1. Appellant possessed two types of drugs while the typical user has one drug of choice.

2. Both drugs are subject to abuse; Oxycodone is an opiate and promethazine, in combination with other drugs, is abused for its sedative effect.

3. The amount of drugs Appellant possessed and their street-level value led the Officer to conclude there was an intent to deliver. A pill of generic oxycodone sells for approximately $12-$40. The twenty pills recovered from Appellant yield a minimum of $240 – the typical user does not have that much money to spend.

4. Neither the name on the bottle of liquid Promethazine nor the bottle of Oxycodone matched Appellant.

This led Officer DeLeon to conclude that Appellant possessed the substances with an intent to deliver them. *Id*. at 3:60-4:91. There were no burner phones nor large amounts of cash found in Appellant's possession -- that of a typical dealer. The expert conceded that often users need more than one pill a day and may purchase in bulk, especially if from outside the City. But those factors did not change the expert opinion of Appellant's intent. He also stated that promethazine, on its own, can be used with an opioid to make the high stronger. It can also possibly be used to alleviate some withdrawal symptoms that come with opiate abuse. *Id*. at 4:94-6:139. Officer DeLeon testified, however, that he had never seen the aforementioned scenarios of using promethazine to strengthen a high or to alleviate withdrawal symptoms in his experience. *Id*. at 6:140-41.

SUMMARY OF ARGUMENT

A. MOTION TO SUPPRESS

Officer safety is paramount in a *Terry* frisk. An officer must be free to investigate without threat or fear of violence. When an officer is justified in his belief that the suspect may have a weapon or other hidden instruments for the assault of the officer, he may use measures that are reasonable for the discovery of such weapons or instruments. Appellant does not argue, here, that the Officer was not justified in his belief that he (Appellant) may have a weapon, he solely argues whether the Officer's reach into his pocket was necessary for the discovery of weapons; It was.

A *Terry* frisk allows an officer to take necessary measures, within reason, to determine whether the person is carrying a weapon and to neutralize the threat. Absolute certainty a suspect is carrying a weapon is not required. Here, the Appellant was a passenger in a car that fled from a traffic stop. He turned his body away from the Officer and disobeyed commands. The Officer felt a hard object in his pocket that he could not eliminate as a weapon. Thus, the reach into Appellant's pocket to discover whether the hard object was a weapon was reasonable to protect not only the officer but also Appellant and others on the scene. The lower court properly denied Appellant's motion to suppress the physical evidence. Officer Grant's actions were well within the bounds of a lawful *Terry* frisk. This Court should affirm.

B. SUFFICIENCY OF EVIDENCE

To succeed on an insufficiency of the evidence claim, Appellant must prove that no rational trier of fact, in viewing the record evidence most favorable to the prosecution and drawing all reasonable inferences from them, could have found proof of guilt beyond a reasonable doubt. There is no question Appellant possessed the bottle of promethazine and twenty oxycodone pills. The Commonwealth provided an expert, whose qualifications were not contested, who testified that

the circumstances surrounding Appellant's possession were demonstrative of intent*;* (1) There were two types of drugs found in his possession; (2) Both drugs are subject to abuse; (3) The value of those drugs was more than a typical user can afford to possess; (4) the labels on the bottles of the drugs were prescribed to a name other than Appellant's. Based on this testimony, the court concluded there was sufficient evidence to prove Appellant possessed the bottle of promethazine and twenty oxycodone pills with an intent to deliver. This Court should affirm the adjudication of delinquency.

ARGUMENT

I. THE MOTION TO SUPPRESS WAS PROPERLY DENIED BECAUSE WHEN THE OFFICER REACHED INTO APPELLANT'S POCKET FOR THE LIMITED PURPOSE OF DISCOVERING WHETHER THE HARD OBJECT THAT HE FELT WAS A WEAPON, HE WAS WELL WITHIN THE BOUNDS OF A LAWFUL *TERRY* FRISK.

Appellant challenges Officer Grant's reach into his pocket to remove the hard object detected during a lawful *Terry* frisk. Appellant asserts the reach goes beyond a *Terry* stop and the evidence recovered should be suppressed.[3] The court properly denied Appellant's motion to suppress physical evidence. Officer Grant, based on the totality of the circumstances, had a reasonable fear that Appellant may have a weapon when he conducted an open-hand pat, felt a hard object that he could not eliminate as a weapon, and removed it from his pocket. Officer Grant reached into Appellant's pocket solely for the investigation of weapons and public safety. This court should affirm the denial of the motion for suppression.

A. Officer Grant's reach into Appellant's pocket was necessary for the protection of himself and the public.

A valid *Terry* frisk is limited to that which is necessary for the discovery of weapons. Its purpose is not to discover evidence but to allow the officer to pursue his investigation without fear of violence. *Commonwealth v. Taylor,* 771 A.2d 1261, 1269 (Pa. 2001) (plurality), citing, *Adams v. Williams*, 407 U.S. 143, 146 (1972). To reach into a suspect's pocket during a frisk, the officer would have to feel something that reasonably appears to be a weapon. *Id*. at 1269.

Taylor was convicted of possession of a controlled substance with intent to deliver after a raid in a convenience store. *Com*. v. *Taylor*, 771 A.2d at 1264. Police officers identified themselves accordingly when they encountered Taylor in the basement of the store wearing a barber's apron

[3] Appellant neither expressly challenged the propriety of the initial traffic stop nor the decision to remove him from the car. Appellant solely challenges the removal of the promethazine bottle from his pocket and the evidence that followed (twenty oxycodone pills). *See* N.T. 07/10/2018 29:9-33:13.

while getting a haircut. Taylor was ordered to show his hands but instead was seen fidgeting underneath the apron. The officer removed the apron, patted Taylor's outer clothing, and felt a hard object. Fearing it could be a weapon, the officer removed the object from Taylor's pocket. The hard object was a prescription bottle containing crack cocaine. The court ruled the prescription bottle recovered during the frisk admissible. *Id*. at 1269-70.

The court concluded that the officer reasonably determined Taylor may have been armed with the touch of the pocket. *Id.* at 1270. Both the pat revealing a hard object in his pocket and the totality of the circumstances – The officers came upon Taylor after a raid of a known drug dealer; Taylor was wearing a barber's apron covering his hands; Taylor was ordered to stop moving his hands and did not comply; And finally, the officer did an exterior pat of his clothing and felt a hard object, that he could not eliminate as a weapon – all contributed to the belief that Taylor may have a weapon and justified the reach into his pockets. *Id*. at 1269. Although a plurality decision, *Taylor* may provide as persuasive principle applicable to the facts in the present case.

Officer Grant's reach into Appellant's pocket was a necessary part of the *Terry* frisk for his protection, his partner's protection, and the other two females at the scene. Officer Grant felt a hard object which he could not eliminate as a weapon. N.T. 07/10/2018 at 14:11-17. His reach into Appellant's pocket was necessary for the discovery of weapons. The sole justification for a *Terry* frisk is the protection of the officers and others nearby. It must be confined to an intrusion designed to discover guns, knives, clubs, or other hidden instruments for the assault of the officer. *Terry v. Ohio*, 392 U.S. at 1, 29 (1968). Since Officer Grant could not eliminate the object as a weapon, and had a reasonable fear Appellant may have one (which is not in dispute) he was entitled to reach into the pocket to dispel that fear. An officer is allowed a limited intrusion upon an

individual's person to pursue investigation without the fear of violence. *Commonwealth v. E.M.,* 735 A.2d 654, 661 (Pa. 1999).

Officer Grant's intrusion did not go beyond what was necessary to discover what the hard object in Appellant's pocket was. He did not go into Appellant's right pocket based on what he felt in his left pocket, he went into his left pocket and even then, only removed the object to identify it. N.T. 07/10/2018 18:3-18:5. Similar to *Taylor*, here, the Officer felt a hard object in Appellant's pocket that he could not identify after ordering him to show his hands, the order was not complied with, the Officer encountered Appellant after he was in the immediate vicinity of illegal activity. All of these circumstances, plus his inability to identify the hard object, justified Officer Grant's reach into Appellant's pocket and was part of a lawful *Terry* frisk.

B. Officer Grant's testimony made clear that upon touching the hard object he could not eliminate it as a weapon.

Absent the officer's testimony that he believed the object felt during an exterior pat down was a weapon, there is no probable cause to justify the intrusive reach into a suspect's pocket. *Commonwealth v. Mesa,* 683 A.2d 643, 646 (Pa. Super. Ct. 1996). Mesa was found with several hundred dollars and marijuana in his pocket after a *Terry* frisk. Because the officer was unable to recall what he perceived he felt when he went into Mesa's pocket, the court concluded that the officer did not think the bulge was a weapon *before* he went into the pocket. *Id*. at. 645, 647 (emphasis added). The Officer could not give specific testimony about what his immediate observations were and the court suppressed the evidence. *Id*. at 648.

Conversely, in the instant case, Officer Grant testified to not being able to eliminate the hard object he felt in Appellant's pocket as a weapon – it was his immediate observation upon

feeling the object from the outer clothing that he did not know what it was.[4] N.T. 07/10/2018 16:24-17:9. Since Officer Grant testified to being unable to eliminate the hard object as a weapon immediately upon feeling it, a limited reach into the pocket for the Officer's safety was justified to discover what it was.

The motion to suppress the evidence was properly denied. Officer Grant's reach into Appellant's pocket for the limited purpose of discovering whether the hard object felt was a weapon, was a lawful part of a *Terry* frisk. Thus, the promethazine recovered during the frisk and the oxycodone recovered incident to arrest were admissible. The lower court did not err in its decision to deny Appellant's motion to suppress. This court should affirm.

II. SUPPORTED BY EXPERT TESTIMONY, THERE WAS SUFFICIENT EVIDENCE TO PROVE POSSESSION WITH INTENT TO DELIVER BASED ON THE QUANTITY, COST, AND TYPES OF SUBSTANCES RECOVERED.

Appellant challenges the sufficiency of the evidence for an adjudication of possession with intent to deliver (PWID). Appellant asserts the substances recovered were for personal use rather than distribution. The court properly determined Appellant possessed the promethazine and twenty oxycodone pills with the intent to deliver based on the amount of drugs recovered, the fact that two different drugs were recovered, and their value. This conclusion was supported by expert testimony. This court should affirm the PWID adjudication.

The question in a sufficiency claim is whether the evidence believed by the fact finder was sufficient to support the verdict. In other words, the court is to determine whether the evidence admitted at trial, when viewed in the light most favorable to the Commonwealth as the verdict winner and drawing all reasonable inferences from them, was sufficient to establish every element

[4] "Plain feel doctrine" is not applicable here. Under "plain feel" a police officer may confiscate a non-threatening object if it becomes "immediately apparent" upon touch during a legitimate *Terry* frisk that the object is contraband. *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993). Officer Grant testified he did not know what the object was. N.T. 07/10/2018 17:7-9.

of the offense beyond a reasonable doubt. *Commonwealth v. Kirkland*, 831 A.2d 607, 610 (Pa. Super. Ct. 2003). In a challenge to a PWID conviction where 'intent' is in question, the Commonwealth can establish that element from an examination of the facts and circumstances surrounding the case. *Id*. at 611, citing *Commonwealth v. Conaway*, 791 A.2d 359 (Pa. Super. Ct. 2002). However, in cases where an examination of the facts and circumstances do not overwhelmingly support the conclusion that drugs were intended for distribution, expert testimony is important. *Com. v. Kirkland,* 831 A. 2d at 612.

Notably, *Kirkland* was a case with no expert testimony. Such testimony is admissible concerning whether the fact surrounding possession is consistent with intent rather than personal use. *Commonwealth v. Jackson,* 645 A.2d. 1366, 1368 (Pa. Super. Ct. 1994), citing, *Commonwealth v. Ariondo*, 580 A.2d 341 (Pa. Super. Ct. 1990). In *Kirkland*, the surrounding circumstances supported a conviction of possession of a controlled substance but not PWID. The drugs were found in plain view on the back seat of a car that defendant was driving and to which he had keys. When defendant asked what the officer found in the car, the officer replied, "You know what we found." At which point defendant replied, "Y'all found narcotics." *Com. v. Kirkland,* 832 A.2d. at 609. The court reasoned that based on these circumstances, defendant was guilty of constructive possession but not an intent to deliver.

In *Johnson*, the police officer observed the defendant in a high crime area, exiting a bar. During a consent search, the officer found two bags containing crack cocaine. After the defendant attempted to flee, the officer recovered seven additional bags of crack cocaine, $86, and a beeper. *Commonwealth v. Johnson*, 782 A.2d. 1040, 1041 (Pa. Super. Ct. 2001). The expert, in that case, testified that defendant possessed crack cocaine with an intent to deliver based on the amount of cocaine recovered, the propensity of a user to have the cocaine packaged differently than defendant

did (which was typical of a seller), defendant had a beeper and lacked paraphernalia to smoke the crack cocaine in. *Id*. The court said the expert testimony established an intent to deliver – the conviction was upheld. Again, in *Commonwealth v. Ratsamy,* 934 A.2d. 1233, 1238 (Pa. 2007), the expert testified the defendant possessed the drugs to deliver based on the amount of drugs and plastic bags recovered from his accomplice.

As in both *Johnson* and *Ratsamy*, the Courts concluded that the totality of the circumstances coupled with the expert opinion based on those circumstances warranted a finding that there was sufficient evidence to support a PWID conviction. The same is true in this case.

The expert testimony here supported Appellant's possession with an intent to deliver adjudication. N.T. 07/10/2018, Expert Testimony, at 3:62-66. The officer based his opinion on: (1) appellant possessed two types of drugs while the typical user has one drug of choice; (2) both drugs, promethazine and oxycodone, are subject to abuse both alone and in combination with one another; (3) the amount of drugs appellant possessed were more than a typical user can afford – in total the pills were worth $240; and (4) the name on neither of bottle labels containing the substances belonged to Appellant. *Id*. at 3:60-4:91. That coupled with the circumstances that led the officer to encounter Appellant -- He was a passenger in a car that fled from a traffic stop, He turned his body away from the officer and did not comply with commands to stop doing so, and the Officer felt a hard object in his pocket -- led the court to conclude Appellant possessed the controlled substances with an intent to deliver them.

The substances recovered from Appellant, their quantity, their price, and evidence that neither prescription had Appellant's name on it, all contributed to both a factual finding of intent based on the circumstances surrounding possession and the expert's opinion that Appellant possessed the substances with the intent to deliver. There is sufficient evidence to support a finding

of intent because a rational fact finder could conclude, based on the facts found at the trial court, that Appellant possessed the drugs with an intent to deliver. The lower court did not err in its decision to find there was sufficient evidence for intent for an adjudication of PWID. This court should affirm.

Applicant Details

First Name	**Miles**
Last Name	**Coll**
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Contact Phone Number	**858 395 3449**

Applicant Education

BA/BS From	**Loyola Marymount University**
Date of BA/BS	**May 2021**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**Not yet ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Van Vleck Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 13, 2023

The Honorable Juan R. Sanchez

United States District Court for the Eastern District of Pennsylvania

James A. Byrne U.S. Courthouse

601 Market Street, Courtroom 14-B

Philadelphia, PA 19106

Dear Judge Sanchez:

I am a law student at The George Washington University Law School (GWU), and will be graduating in May 2024. I am writing to apply for a judicial clerkship with you for the 2024 term. I am enclosing a resume, a transcript, and a writing sample. Enclosed as well are recommendations from Rami Sibay, Paul Crane, and Connor Mullin. Thank you for your consideration.

Sincerely,

Miles Coll

MILES COLL

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EDUCATION

The George Washington University Law School — Washington, D.C.
Transfer Student, Juris Doctor Candidate — May 2024

- Activities: Van Vleck Moot Court
- Clubs: Antitrust Law Association (ALA); Anti-Corruption & Compliance Association (ACCA); Banking and Securities Law Society (BaSL)

American University Washington College of Law — Washington, D.C.
GPA: 3.48 — Attended, August 2021 - May 2022

- Finished in the top third of my class
- Graded onto the Administrative Law Review (ALR), the official journal of the American Bar Association

Loyola Marymount University — Los Angeles, CA
Bachelor of Arts in Political Science — May 2020

EXPERIENCE

U.S. Department of Justice (DOJ), Criminal Division (CRM), Public Integrity Section (PIN) — Washington, D.C.
Intern — Fall 2023

Judge Lydia Kay Griggsby, U.S. District Court of Maryland — Greenbelt, MD
Intern — May 2023 – August 2023

- Drafting opinions on civil procedure and contract questions unaddressed by the 4th Circuit
- Dissecting opinions and reviewing dockets with Judge Griggsby

U.S. Attorney for the District of Columbia (USADC), Criminal Division, Federal Major Crimes Section — Washington, D.C.
Intern — January 2023 – April 2023

- Drafted court-ready filings including sentencing memos and plea offers
- Researched novel legal issues arising out of USADC's unique jurisdiction as the only Office with both federal *and* local prosecutorial authority
- Participated in weekly debriefs with the entire Section

U.S. Department of Justice (DOJ), Tax Division (TAX), Civil Appeals Section — Washington, D.C.
Intern — September 2022 – December 2022

- Drafted briefs for upcoming cases in the D.C. Circuit Court of Appeals
- Researched case law and highly technical IRC provisions
- Mooted with attorneys who were preparing for upcoming oral arguments

American University Washington College of Law — Washington, D.C.
Research Assistant, Prof. Susan Carle — May 2022 – August 2022
Criminal Justice Clinic, American University Washington College of Law — Washington, D.C.
Dean's Fellow — May 2022 – August 2022

SKILLS AND INTERESTS

Enjoy running, physical fitness and San Diego sports fandom. Have done extensive travel through Europe and North America; parts of Southeast Asia and Latin America.

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

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Page: 1

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REFNUM:5416357

Current College(s):Law School
Current Major(s): Law

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
NON-GW HISTORY:			
2021-2022	American University		
LAW 6202	Contracts	4.00	TR
LAW 6206	Torts	4.00	TR
LAW 6208	Property	4.00	TR
LAW 6210	Criminal Law	3.00	TR
LAW 6212	Civil Procedure	4.00	TR
LAW 6214	Constitutional Law I	4.00	TR
LAW 6216	Fundamentals Of Lawyering I	2.00	TR
LAW 6217	Fundamentals Of Lawyering II	2.00	TR
LAW 6470	Intellectual Property	2.00	TR
Transfer Hrs: 29.00			
Total Transfer Hrs: 29.00			
GEORGE WASHINGTON UNIVERSITY CREDIT:			
Fall 2022			
Law School			
Law			
LAW 6209	Legislation And Regulation Dooling	3.00	B+
LAW 6250	Corporations Roth	4.00	B+
LAW 6402	Antitrust Law Longwell	3.00	A-
LAW 6644	Moot Court - Van Vleck	1.00	CR
LAW 6668	Field Placement Mccoy	2.00	CR
LAW 6672	The Art Of Lawyering Simeone	2.00	B
Ehrs 15.00	GPA-Hrs 12.00	GPA	3.361
CUM 15.00	GPA-Hrs 12.00	GPA	3.361
Good Standing			
Spring 2023			
Law School			
Law			
LAW 6252	Securities Regulation	3.00	A-
LAW 6290	Banking Law	2.00	B
LAW 6360	Criminal Procedure	4.00	B-
LAW 6362	Adjudicatory Criminal Pro.	3.00	B+
LAW 6478	Licensing Ip Rights	2.00	B+
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	1.00	CR
Ehrs 15.00	GPA-Hrs 14.00	GPA	3.167
CUM 30.00	GPA-Hrs 26.00	GPA	3.256
Good Standing			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Summer 2023			
LAW 6218	Prof Responsibility & Ethics	2.00	----------
Credits In Progress:		2.00	
Fall 2023			
LAW 6232	Federal Courts	3.00	----------
LAW 6256	Mergers And Acquisitions	2.00	----------
LAW 6264	Securities Law Seminar	2.00	----------
LAW 6363	Role Of The Federal Prosecutor	2.00	----------
LAW 6382	First Amendment - Speech/Press	3.00	----------
LAW 6521	International Money Laundering	3.00	----------
Credits In Progress:		15.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	30.00	26.00	84.67	3.256
TOTAL NON-GW HOURS	29.00	0.00	0.00	0.00
OVERALL	59.00	26.00	84.67	3.256

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

COLL MILES A 5224772 10/31

06/08/22 1 OF 1

FALL 2021

LAW-501	CIVIL PROCEDURE	04.00	A-	14.80
LAW-504	CONTRACTS	04.00	A-	14.80
LAW-516	LEGAL RESEARCH & WRITING I	02.00	B	06.00
LAW-522	TORTS	04.00	A-	14.80

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 50.40QP 3.60GPA

SPRING 2022

LAW-503	CONSTITUTIONAL LAW	04.00	B+	13.20
LAW-507	CRIMINAL LAW	03.00	A-	11.10
LAW-517	LEGAL RESEARCH & WRITING II	02.00	B+	06.60
LAW-518	PROPERTY	04.00	B+	13.20
LAW-670	INTELLECTUAL PROPERTY LAW	02.00	B+	06.60

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 50.70QP 3.38GPA

LAW CUM SUM: 29.00HRS ATT 29.00HRS ERND 101.10QP 3.48GPA

END OF TRANSCRIPT

June 13, 2023

Dear Judge:

I am writing to sing the praises of Miles Coll, who interned with us in the Spring of 2023 at the U.S. Attorney's Office. He worked in the Federal Major Crimes section of our Criminal Division, where I serve as an AUSA (and intern coordinator). His research and writing abilities were the strongest of any intern in my four years in the office. He produced polished and compelling written work product that would have been good for a young lawyer, let alone a law student, on complicated areas of law from conspiracy to obstruction. Miles is detail-oriented, diligent, and professional. He was always eager to learn, ask questions, and come to court. His inside knowledge of the workings of federal court will give him a leg up on other candidates.

Before joining the U.S. Attorney's Office, I practiced for a decade at Akin Gump. I serve as an Adjunct Professor at Georgetown Law. I can say without reservation that Miles is the sort of candidate we looked for at the firm, in government service, and in class. He will be an asset to your chambers. We were lucky to have him.

Sincerely,

Connor Mullin

Assistant U.S. Attorney for the District of Columbia

Adjunct Professor, Georgetown Law

Connor Mullin - Connor.Mullin@usdoj.gov

The following is a statement of facts I drafted while working at the Department of Justice's Tax Division, in the Appellate Section. The draft was later used in a brief that was submitted in the US Court of Appeals for the Second Circuit. The Department would only permit me to use the sample if I redacted the petitioning taxpayers' names.

The issue on appeal was whether dismissal was categorically justified if an IRS officer improperly referred a taxpayer to the Justice Department while the same taxpayer's installment offer was still pending. The Eastern District of New York concluded that an improper referral did not necessarily preclude a case from moving forward.

STATEMENT OF THE CASE

A. Background

1. Taxpayers' original joint-filing and the Treasury Department's liability assessment

On October 15, 2008, John Doe and Jane Doe ("Taxpayers") filed their 2007 joint income tax return, reporting a $91,945.00 tax liability. *See* Doc. No. 32 at 53; *also see* Doc. No. 1 at 6 (providing all of the assessments made against Taxpayers between 2008 and 2016). However, Taxpayers did not pay the tax reported on the return. *See id.* On November 3, 2008, the Secretary of the Treasury Department ("Treasury") delegated an Internal Revenue Service ("IRS") representative to make an assessment against Taxpayers for federal income taxes, penalties, and interest. *See* Doc. No. 32 at 54. The delegate concluded Taxpayers owed $112,324.18. *See id.*

After the assessment, Taxpayers did not submit anything to the IRS for nearly ten years. *See id.*

2. Taxpayers' reemergence in 2017

On December 7, 2017, Taxpayers submitted an installment agreement request under 26 U.S.C. § 6159. *See id.* Taxpayers proposed paying $361 a month. *See id.* That same day, two transactions

appeared in Taxpayers' IRS accounts. *See id* at 55. One of the transactions mistakenly said Taxpayers' proposal was "granted and active."[1] *See id*. However, the IRS never sent Taxpayers a written notice accepting Taxpayers' settlement agreement proposal. *See id*. Still, Taxpayers proceeded to make six voluntary $361 payments. *See id*. In August 2018, Taxpayers stopped making payments after an IRS officer visited Taxpayers at their home.[2] *See* Doc. No. 32 at 54.

At some unclear time late in 2018, but before October 30, 2018, the IRS referred Taxpayers' case to the Department of Justice ("DOJ"). *See id*. It *is* clear, though, that on September 14, 2018, an entry appeared on Taxpayers' IRS account, stating, "Legal suit pending." *See id*. Moreover, an IRS form dated September 19, 2018 and titled "Request for Installment Agreement – Independent Review Prior to Rejection," suggested the IRS was rejecting Taxpayers' proposal. *See id*.

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[1] The first transaction stated, "Request for installment agreement pending"; the second transaction stated "Installment agreement granted and active." *Id*.

[2] The IRS Officer also left the Taxpayers written note stating, "Levy. Suit to Reduce Claim to Judgment. In process." *See id*; Doc. No. 23 at 27.

Finally, on October 30, 2018, the IRS sent Taxpayers a letter formally rejecting their request for an installment agreement.[3] *See id*.

The letter also informed Taxpayers they only had until November 29, 2018 to appeal the rejection. *See id*. Taxpayers failed to appeal. *See* Doc No. 32 at 55.

B. The suit to reduce the federal income tax liabilities to judgment

On November 30, 2018, the Government brought suit in the District Court for the Eastern District of New York, seeking to reduce the taxpayers' 2007 federal income tax liabilities to judgment. *See id*; Doc. No. 1 at 5-7. Both parties moved for summary judgment, with Taxpayers asserting that the Government's collection action was barred because the IRS improperly referred their case to the DOJ before the taxpayers' request was formally rejected on October 30, 2018. *See* Doc. No. 32 at 56; Doc. No. 26 at 7-11. The District Court granted summary judgment to the Government, holding that the IRS' referral while

[3] For more on the IRS' justification for denying the taxpayers' proposal and why, " 'in the alternative …' the October 30 letter constituted 'a formal notice,'" *see id*; Doc. No 23 at 29.

Taxpayers' installment agreement request was pending did not bar the Government's action. *See id* at 63.

Specifically, the District Court concluded that 26 U.S.C. § 6331(k) was only concerned with, "the timing of the *commencement of a court proceeding*, not the timing of the referral itself." *Id* at 60, *also see* 63 (emphasis added). Taxpayers argued that 26 C.F.R. § 301.6331-4(b)(2) unambiguously prohibited the IRS from making commencement referrals to the DOJ before the IRS notified taxpayers with a formal rejection. *See id* at 59; *also see* Doc. No. 14-1 at 21. The District Court disagreed, emphasizing that the dispute did not hinge on whether the "IRS's referral of the action to the DOJ was untimely," but instead asked "whether the IRS's concededly premature referral serves to bar this suit." Doc. No. 32 at 60.

Carrying out this inquiry, the District Court held that Taxpayers failed to establish that 26 C.F.R. § 301.6331-4(b)(2) expressly proscribed *per se* liability under 26 U.S.C. § 6331(k). *See id* at 61, 63. The Court explained that regulations, "may not serve to modify a statute," and instead "must … be viewed 'in the context of the statute they are designed to explicate.'" *Id* at 60-61 (citing *Koshland v. Helvering*, 298

U.S. 441, 447, 56 S.Ct. 767, 770, 80 L.Ed. 1268 (1936)); (citing *Iglesias v. United States*, 848 F.2d 362, 367 (2d. Cir. 1988)). Yet, the Court noted, 26 U.S.C. § 6331(k) "makes no [express] mention of IRS referrals." *Id* at 61; *also see* 63. Necessarily then, by contending that § 301.6331-4(b)(2) barred collection actions "exclusively because of … technical, nonprejudicial [errors] on the part of the government," Taxpayers were asking the Court to "add to the statute 'something which is not there.'" *Id* at 61 (citing *United States v. Calamaro*, 354 U.S. 351, 359, 77 S.Ct. 1138, 1143, 1 L.Ed.2d 1394 (1957)).

The Court also held that Taxpayers' strict reading of § 301.63314(b)(2) went against "the overarching statutory context" of 26 U.S.C. § 6331(k)'s passage. *Id* at 63. Taxpayers asked the Court to interpret § 301.6331-4(b)(2) as a bar on *all* collection cases improperly referred to the DOJ by the IRS before Taxpayers received a formal rejection. *See id* at 62; *also see* Doc. No. 26 at 41, 49-50. Yet Congress passed 26 U.S.C. § 6331(k) solely to ensure taxpayers who took "affirmative steps to satisfy their outstanding tax liabilities [were] entitled to robust, procedural safeguards prior to IRS action." Doc. No. 32 at 62. In this case, however, "the IRS's premature referral did not practically deprive

[Taxpayers] of any such safeguards."[4] *Id*. Therefore, Taxpayers' construction of § 301.6331-4(b)(2) was "plainly 'out of harmony with'" the statutory context of 26 U.S.C. § 6331(k)'s passage. *Id*.

Thus, the Court denied Taxpayers' motion for summary judgment. Doc. *See id* at 63. The Court ruled that Taxpayers failed to materially dispute the Government's contention that 26 U.S.C. § 6331(k) only concerned the timing of levies, and therefore failed to establish that the IRS's premature referral barred the Government's action. *See id*. Since both motions were solely disputing the scope of 26 U.S.C. § 6331(k), the Court entered judgment in favor of the Government.[5] *See* Doc. No. 32 at 63. On June 2, 2022, the Court officially filed its order granting judgment, entering $112,324.18 for the government, plus statutory

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[4] For a more complete examination of the safeguards afforded to the Taxpayers, *see id* at 53 (emphasizing that the proposal was "indisputably reviewed"; the Taxpayers received a "detailed, written notice"; the Taxpayers were given "30 [extra] days to appeal"; and, "most critically," the Taxpayers did not appeal "until after the … window expired and levy was no longer prohibited.")

[5] For more on the issues that were left uncontested, *see id* at 61 (noting that Taxpayers "did not contest [the Government's] stated rationale" for the action, nor that they "suffered any harm" from the IRS's premature referral); *also see* Doc. No. 26 at 47-51.

additions and interest accruing from and after September 30, 2020. Doc. No. 33 at 64.

C. Taxpayers' Notice of Appeal

On July 19, 2022, Taxpayers filed a Notice of Appeal in the U.S. Court of Appeals for the Second Circuit. *See* Doc. No. 34 at 59. Taxpayers seek to reverse the District Court's denial of their Motion for Summary Judgment. *See id*.

The following is a memo I recently drafted in the U.S. Attorney's Office for the District of Columbia (USADC). At the time, the Government was charging the defendant with a separate crime, and holding the defendant's properly-seized phone as potential evidence. However, some time before trial, the Government learned the defendant attempted to erase the phone's information from a remote location. The Government could clearly charge the defendant with obstruction of justice under D.C. law. However, because of D.C.'s unique jurisdiction, I researched whether the Government *could also* charge the defendant with *federal* obstruction of justice.

The case law I found was limited, but on-point. I am including this sample because the USAA supervising the assignment told me he was extremely impressed with the work, and suggested I include it in future applications. The memo has not been edited by anyone else.

To: Paul Courtney

From: Miles Coll

Date: February 16, 2023

MEMORANDUM

I. Issue

Whether the government may charge a defendant with *federal* obstruction for interfering with a *state*-issued subpoena, even if the defendant did not have knowledge of the ongoing *federal* investigation?

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II. Synopsis

Unlikely. The United States District Court for the District of Columbia has held that the D.C. Superior Court is not a "court of the United States" under 18 U.S.C. § 1503. *United States v. Smith*, 729 F. Supp at 1385 (D.D.C. 1990) (citing *United States v. Regina*, 504 F. Supp. at 629, 631 (D. Md. 1980) (holding that the D.C. Superior Court was not a "court of the United States" under § 1503)). Moreover, the D.C. District Court held that § 1503's specific prohibitions limited the entire statute, including § 1503's catch-all provision in the second clause. *Id.* at 1382 – 83. Therefore, the Court held that an individual may only be charged under § 1503 if the defendant has the specific intent to obstruct a federal proceeding. *See id*.

III. Analysis

In *Smith*, the D.C. Metropolitan Police Department ("MPD") set up a series of sting operations, after investigating complaints that an officer ("the defendant") was "skim[ing]"

seized drugs and money during arrests. 729 F. Supp at 1381. During the second sting, the defendant seized 18 packets of government-manufactured cocaine while arresting an undercover MPD officer. *Id*. The defendant confirmed MPD's suspicions when he only turned in 15 of the 18 packets. *Id*. On this basis, the government charged the defendant with obstruction of justice under 18 U.S.C. § 1503 (along with two local charges). *Id*. at 1382. Specifically, the defendant was federally charged with "endeavor[ing] to … impede … the due administration of justice by breaching his duty as a police officer when he intentionally failed to preserve property that he had lawfully seized." *Id*. at 1383.

Under § 1503, an individual may be punished for obstruction of justice if the individual "corruptly … endeavors to … impede any … officer in or of any court of the United States … or officer who may be serving at any … proceeding … in the discharge of his duty … or corruptly … impedes, or endeavors to … impede, the due administration of justice." 18 U.S.C. § 1503. The Court separated the statute into "its two operative parts: 1) the specific prohibitions against endeavoring to … impede any … officer; and 2) the so-called 'omnibus' or 'catch-all' clause, prohibiting any endeavor to … impede 'the due administration of justice.'" *Smith*, 729 F. Supp at 1382 – 83.

The government contended that § 1503 did not carry an actual knowledge-requirement. *See id*. at 1385. The government conceded that the D.C. Superior Court did not satisfy § 1503's "court of the United States"-element. *Id*. (citing *Regina*, 504 F.Supp. at 629, 630).[1] However, § 1503's "judicial … proceeding"-requirement, the government argued, *only* limited § 1503's first clause, *rather than* the entire statute. *See id*. at 1383. Thus, the government could *also* seek a § 1503 conviction by showing the defendant "endeavor[ed] to … impede, the due administration of

[1] By leaving the government's concession undisputed, the Court also implicitly assumed *Regina* as the relevant precedent.

justice [*anywhere*]," *even if* the government could not show the defendant actually knew the specific, already-pending "proceeding" he was obstructing. *See id*. On this basis, that the defendant only knew the cocaine packets would be evidentiarily submitted in Superior Court at the time of the obstruction was irrelevant. *See id*. Instead, the government could meet its burden merely by showing the defendant's intent to obstruct *any* proceeding. *See id*.

The defendant argued that § 1503's "judicial … proceeding"-requirement limited the *entire* statute, and therefore not only burdened the government with establishing the defendant's general intent to obstruct, *but also* with establishing that the defendant *knowingly* obstructed some *specific*, *already-pending* proceeding. *Id.* at 1385. Based on the government's concession, the defendant argued the government could not meet that burden. *See id*. Since the three missing cocaine packets were initially only going to be evidentiarily submitted in a Superior Court proceeding, necessarily then, the defendant could only have *knowingly* obstructed a Superior Court proceeding (rather then *also* knowingly have obstructed a *District Court* proceeding). *See id.* Thus, the defendant could not have specifically intended to obstruct a § 1503 proceeding, because the defendant only knew he was obstructing a proceeding in a court that was not recognized by § 1503. *See id*.

The District Court rejected the government's § 1503 interpretation of the "judicial … proceeding"-requirement, and concluded it limited the entire statute, including the "endeavor[ed] to … impede, the due administration of justice"-provision. *See id*. (citing *United States v. Capo*, 791 F.2d 1054, 1070 (2nd Cir. 1986) (holding that "To obtain a conviction under this section, the government must show that there was a pending judicial proceeding … and the defendant knew of and sought to influence, impede or obstruct the judicial proceeding")). The Court emphasized that "[pending] judicial proceedings … at the time of [the] defendant's conduct is … a *sine qua*

non of a charge under Section 1503." *Id*. at 1385. Since the government couldn't establish the defendant intentionally obstructed a federal proceeding, the court dismissed the defendant's federal charge. *Id*. at 1387.

Applicant Details

First Name	**Edward**
Middle Initial	**A**
Last Name	**Colombo**
Citizenship Status	**U. S. Citizen**
Email Address	**colombo.eddie@gmail.com**
Address	**Address** Street **1515 Columbia Street Unit A** City **Houston** State/Territory **Texas** Zip **77008** Country **United States**
Contact Phone Number	**8033948175**

Applicant Education

BA/BS From	**Seton Hall University**
Date of BA/BS	**May 2017**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 22, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Sports & Entertainment Law Journal** **Virginia Journal of Criminal Law**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Texas**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kevin, Cope
kcope@law.virginia.edu
(434) 924-4492

Prakash, Sai
prakash@law.virginia.edu
434-243-8539

Mitchell, Greg
greg.mitchell@law.virginia.edu
(434) 243-4088

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am currently a first-year associate in the Houston office of Bracewell LLP, practicing in their litigation group. I am interested in applying for a clerkship in your chambers starting any time in 2024.

Enclosed please find a copy of my resume, my law school and undergraduate transcripts, and a writing sample. You will also be receiving letters of recommendation from Professors Saikrishna Prakash, Paul Mitchell, and Kevin Cope.

If you have any questions or need to contact me for any reason, please feel free to reach me at the above address and telephone number. Thank you very much for considering me.

Sincerely,

Edward Colombo

Edward A. Colombo

1515 Columbia Street Unit A, Houston, TX 77008 • (803) 394-8175 • colombo.eddie@gmail.com

BAR ADMISSION

Admitted to Texas State Bar, 2022

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., May 2022

- *Virginia Journal of Criminal Law*, Articles Development Editor
- *Virginia Sports & Entertainment Law Journal*, Senior Editorial Board
- Community Fellow
- Federalist Society, 3L Committee

Seton Hall University, South Orange, NJ
B.A., Political Science & Philosophy, *summa cum laude*, May 2017

- Valedictorian, College of Arts and Sciences
- University Honors Program
- Senior Thesis: *The Forgotten Culprit in America's 2008 Financial Crisis*

EXPERIENCE

Bracewell LLP, Houston, TX
Litigation Associate, September 2022 — Present
Summer Associate, May — July 2021

- Researched and wrote memorandum analyzing common law trademark use
- Drafted and filed notice of removal
- Researched and wrote memoranda on various issues for litigation practice

Professor Saikrishna Prakash, University of Virginia School of Law, Charlottesville, VA
Research Assistant, May 2020 — May 2022

- Researched the history of presidential war powers
- Assisted in preparing academic article on the non-delegation doctrine for publication

Professor Kevin Cope, University of Virginia School of Law, Charlottesville, VA
Research Assistant, Summer 2020

- Assisted in the creation of a time sensitive COVID-19 survey
- Researched refugee and asylum laws and prepared summary country memoranda for Russia and Germany

Independent Contractor, Owings Mills, MD
Home Remodeling, June 2017 — June 2019

- Planned and performed a comprehensive remodeling of a 4,000 square foot brick colonial, including electrical, plumbing, flooring and room renovations

Seton Hall University, South Orange, NJ
Head Resident Assist., August 2016 — May 2017; *Resident Assist.*, August 2015 — May 2016

- Trained resident assistants in conflict resolution and other techniques
- Planned and supervised events including move-in procedures

INTERESTS

Rat Pack, UVA Softball, Hiking

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Edward Colombo

Date: June 10, 2022
Record ID: eac3yg

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2019			
LAW	6000	Civil Procedure	4	B+	Nelson,Caleb E
LAW	6002	Contracts	4	A-	Kordana,Kevin A
LAW	6003	Criminal Law	3	B+	Ferzan,Kimberly
LAW	6004	Legal Research and Writing I	1	S	Buck,Donna Ruth
LAW	6007	Torts	4	B	Duffy,John F
		SPRING 2020			
LAW	6001	Constitutional Law	4	CR	Prakash,Saikrishna B
LAW	7019	Criminal Investigation	3	CR	Armacost,Barbara Ellen
LAW	6107	International Law	3	CR	Deeks,Ashley
LAW	6005	Lgl Research & Writing II (YR)	2	S	Buck,Donna Ruth
LAW	6006	Property	4	CR	Schragger,Richard C.
		FALL 2020			
LAW	6103	Corporations	4	A-	Kordana,Kevin A
LAW	8651	Emerg Growth/Venture Captl:P&P	2	B+	Lincoln,Michael Robert
LAW	6104	Evidence	4	A-	Mitchell,Paul Gregory
LAW	6106	Federal Income Tax	4	B	Hayashi,Andrew T
		SPRING 2021			
LAW	6102	Administrative Law	4	A-	Bamzai,Aditya
LAW	7005	Antitrust	4	B+	Nachbar,Thomas B
LAW	7018	Criminal Adjudication	3	B+	Frampton,Thomas Ward
LAW	7043	Insurance	3	B+	Abraham,Kenneth S
		FALL 2021			
LAW	8000	Advanced Legal Research	2	A	Ashbrook,Leslie
LAW	8003	Civil Rights Litigation	3	B+	Jeffries Jr.,John C
LAW	7111	Con Law II: Survy/Civl Liberty	3	A-	Ballenger,James Scott
LAW	7071	Professional Responsibility	3	B+	Mitchell,Paul Gregory
LAW	9062	Supreme Crt Warren to Roberts	3	A-	Howard,A. E. Dick
		SPRING 2022			
LAW	7160	Computer Crime	3	A-	Bamzai,Aditya
LAW	9277	Conservation Planning and Law	3	B+	Verkerke,J H
LAW	6105	Federal Courts	4	B+	Ahdout,Zimra Payvand
LAW	7062	Legislation	4	A-	Nelson,Caleb E

June 20, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I'm pleased to write this letter supporting Edward ("Eddie") Colombo's clerkship application. I've known Eddie since last year, when he served as a full-time summer research assistant. Based on my experiences with him, I know that Eddie will make an excellent law clerk.

Eddie served as a student researcher for me in the summer of 2020. Although most of our correspondence was virtual due to the pandemic, he proved as diligent and self-motivated as any of the other student researchers I've worked with over the years. I assigned him a diverse set of research tasks that required ingenuity, meticulousness, and/or complex legal analysis, and he completed them all at a high level.
One of his tasks was to research and prepare country memoranda on the immigration and refugee law of other countries for a series of comparative survey experiments. The work involved researching statutes and regulations, and compiling data to understand how immigration law works in other countries. Specifically, he analyzed immigration data and the legal process for seeking asylum in Germany and Russia. His Russian memo found that the process for seeking asylum status in Russia formally complies with international law, yet in practice asylum seekers have fared poorly in receiving and maintaining assistance. His memo on Germany analyzed the recent increase in asylum applications there stemming from the Syrian Civil War. All of this work was of outstanding quality, and, although Eddie had no previous experience with either immigration or these national legal systems, he gained expertise in both quite quickly.

Eddie also performed a series of editing and legal translation tasks. He reviewed and edited a proposal for an Oxford University Press research handbook proposal, giving astute comments and feedback. He also performed some data work, analyzing attorney responses to a series of surveys about experience with judges. He closely scrutinized the discrepancies between user-compiled information and computer-collected data. He worked well as part of a small team of research assistants to develop strategies to ensure the worksheets were properly coded.

I myself clerked for federal judges at both the trial and appellate levels, and I've seen the research skills that make for an excellent law clerk. On that basis, I'm pleased to recommend Eddie wholeheartedly. I'd be happy to speak with you further about him if it would be helpful.
Sincerely,

Kevin L. Cope
Associate Professor of Law and Public Policy Affiliated Faculty, Department of Politics

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Edward Colombo for a clerkship. I got to know Eddie while he was a student in my evidence class, and I have reviewed Eddie's writing sample, resume, and transcript.

Eddie was very good in my evidence class. He asked great questions, gave superb answers to my hypotheticals, and showed genuine enthusiasm for learning the law. He wrote a strong exam, and his contributions in class improved the class for everyone. Eddie writes clearly and persuasively, as you will see from his writing sample, and his analytical skills are strong. In addition to all of his coursework, Eddie serves as an editor on two student journals and is actively involved in a number of student associations. Eddie obviously can handle a heavy workload.

In addition to his intelligence and strong work ethic, Eddie's demeanor makes him a good clerkship candidate. Eddie is mature, respectful, and intellectually curious. He loves hard legal problems and interesting legal debates.

Eddie will be a splendid addition to any judicial chambers. He will produce quality work in a timely fashion, and he will be a mature and responsible member of your team. I hope you will give him strong consideration.

Sincerely,

Gregory Mitchell

Greg Mitchell - greg.mitchell@law.virginia.edu - (434) 243-4088

Edward A. Colombo
1515 Columbia Street Unit A
Houston, TX 77008
(803) 394-8175

As a summer associate at Bracewell LLP, I prepared the attached memorandum for an assignment in the litigation department. The memorandum examined the Outer Continental Shelf Lands Act and whether its jurisdictional provision applied to a purely contractual dispute.

To preserve client confidentiality, all individual names and locations have been changed. This writing sample was entirely self-produced and self-edited. I have received permission from my employer to use this memorandum as a writing sample.

QUESTION PRESENTED

In the Fifth Circuit, does the Outer Continental Shelf Lands Act (OCSLA) apply to a strictly contractual dispute to recover overcharges from the shipment of oil from a site in the [Redacted] via a pipeline permanently connected to the sea bed?

FACTS

[Client] and [Party] contracted to extract oil from the [Redacted] and transport the oil via a pipeline permanently connected to the sea bed. The contractual relationship between [Client] and [Party] is ongoing. The dispute relates specifically to an overcharge, rather than tort actions common in OCSLA disputes. The parties' contract contains a choice of law provision. If OCSLA applies to the contractual dispute, [State's] law will apply because OCSLA contains a mandatory choice-of-law provision, which applies the substantive law of the "adjacent state" to the extent that it isn't inconsistent with federal law and maritime law doesn't apply. 43 U.S.C. § 1333(a)(2)(A).

SUMMARY OF ARGUMENT

The Fifth Circuit should find that OCSLA jurisdiction governs this dispute, and therefore [State's] substantive law applies. First, OCSLA's statutory jurisdictional grant and Fifth Circuit precedent confirm that OCSLA applies broadly. "Any dispute that alters the progress of production activities on the OCS and thus threatens to impair the total recovery of… federally owned minerals was intended by Congress to come within the jurisdictional grant of section 1349." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 570 (5th Cir. 1994).

Second, [Client] satisfies the Fifth Circuit's "focus-of-the-contract test" to determine OCSLA situs status. The pipeline at issue is a permanent structure connected to the "subsoil or

seabed" and the "focus-of-the-contract" involves the production, exploration, or development of OCS materials on an OCSLA situs.

Finally, case law finding a lack of OCSLA jurisdiction proves factually dissimilar to [Client's] case. The two cases most factually analogous to [Client's] dispute, *El Paso E&P Co.* and *W & T Offshore* find OCSLA applicable, with less connection to the OCS than [Client] has.

ARGUMENT

I. OCSLA'S JURISDICTIONAL GRANT

OCSLA provides a system for offshore oil and gas exploration, leasing, and ultimate development of natural resources. OCSLA covers the "full range of potential legal problems that might arise in connection with operations on the Outer Continental Shelf." *EP Operating Ltd. P'ship*, 26 F.3d at 569. OCSLA's statutory language supports a broad reading of its jurisdictional reach, stating that district courts shall have jurisdiction over cases and controversies "arising out of, or in connection with any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf." 43 U.S.C. § 1349(b)(1)(A).

II. OCSLA SITUS PRONG

In order for adjacent state law to apply as surrogate federal law under OCSLA, the Fifth Circuit considers three conditions, now known as the *PLT* test. "(1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law." *Union Texas Petroleum Corp. v. PLT Eng'g,*

Inc., 895 F.2d 1043, 1045 (5th Cir. 1990). The key prong at issue in [Client's] dispute is prong one, whether the controversy arose on an OCSLA situs. This is a purely contractual dispute, and therefore the overcharge did not physically take place on the OCS. However, this fails to impede OCSLA jurisdiction based on Fifth Circuit Precedent.

A. The Focus-Of-The-Contract Test Confirms [Client's] Dispute Occurred on an OCSLA Situs.

The law governing the resolution of a contractual dispute, i.e., enforceability of an indemnity provision is governed by the "focus-of-the-contract test." This test determines the situs of the controversy in contractual disputes. *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 781 (5th Cir. 2009).

The dispute at issue in *Grand Isle Shipyard* stemmed from the enforceability of an indemnity provision following the injury of an employee. *Id.* The employee's injury occurred on a vessel, despite no physical contact with "the [OCS] platform when the accident occurred." *Id.* at 781-82. Notwithstanding the lack of physical connection to the OCS, the Fifth Circuit determined the first prong of the *PLT* test is satisfied "if a majority of the work called for by the contract is on stationary platforms or other enumerated OCSLA situses." *Id.* at 787. OCSLA situses include those enumerated in 43 U.S.C. § 1333(a)(2)(A), "fixed structures" on the "subsoil and seabed of the outer Continental Shelf." *Id.*

The Fifth Circuit and lower courts continue to apply the "focus-of the-contract test." *See ACE Am. Ins. Co. v. M-I, L.L.C.*, 699 F.3d 826, 830 (5th Cir. 2012); *Thibeaux v. Merit Energy Co., LLC*, 920 F. Supp. 2d 706, 710 (W.D. La. 2013); *SM Energy Co. v. Smackco, Ltd.*, No. 11-CV-3028, 2012 WL 4760841, at *4 (S.D. Tex. Oct. 5, 2012).

B. OCSLA Jurisdiction Applies to Onshore Processing Activities.

Grand Isle Shipyard prioritized the "focus-of-the-contract" rather than the physical site of the controversy. Recently, lower courts in the Fifth Circuit expanded the reach of OCSLA to onshore activities, even further removed from the OCS.

Two parties entered into a production handling agreement (PHA) where WTI "delivered what it produced from the well…[oil and water] to Apache's processing facility…via subsea pipelines." *W & T Offshore, Inc. v. Apache Corp.*, 918 F. Supp. 2d 601, 604 (S.D. Tex. 2013). WTI alleged Apache "consistently underallocat[ed] oil to WTI" and failed to pay WTI for oil they produced. *Id.* at 605. WTI argued that OCSLA should not govern because the controversy arose in a Houston office building, and wasn't "directly related to the development of minerals on the OCS." *Id.* at 607.

Despite failing to extend OCSLA jurisdiction to all onshore support facilities, the court noted that although much of the disputed activity "took place in an office building in Houston, the statements and acts relate to the work done under the parties'…contract." *Id.* at 613. Consistent with *Grand Isle Shipyard*, WTI properly showed a "majority of the work contemplated in the PHA, including the work giving rise to the alleged tort claims and damages, was performed on an OCS situs, the Apache platform." *Id.*

Onshore separation facilities are "OCSLA situses" when the "focus-on-the-contract test" provides a sufficient nexus to the "exploration, development, and production of minerals." *El Paso E&P Co., L.P. v. BP Am. Prod. Co.*, No. 2:09-CV-1753, 2010 WL 11575513, at *1-6 (W.D. La. Oct. 25, 2010). The contract outlined a refining process, which included offshore wells extracting streams from the OCS and their subsequent transport to a separation facility. *Id.* at *2.

Although the separating facility operated onshore, it "generate[d] usable products from a stream of useless muck" and was necessary for mineral production. *Id.* at *6. This process classified the separating facility under the "development" prong of 43 U.S.C. § 1349(b)(1). *Id.* The court applied the "focus-of-the-contract test" in order to determine whether the onshore separating facility possessed a sufficient nexus to the "exploration, development, and production of minerals." *Id.* at *6-7. Despite the facility's onshore location, the court ruled in favor of OCSLA jurisdiction because the suit involved the development of OCS minerals and the contract focused on "producing the minerals discovered." *Id.* at *9.

III. CASES LACKING OCSLA JURISDICTION ARE EASILY DISTINGUISHED

Although the Fifth Circuit interprets OCSLA's jurisdictional grant broadly, certain disputes fail to qualify. *Tenn. Gas Pipeline v. Hous. Cas. Ins. Co.*, 87 F.3d 150, 156 (5th Cir. 1996). In a recent case, the Southern District of Texas held OCSLA inapplicable because the "disputed agreements lack the connection to a physical act on the OCS required to trigger § 1349(b) of the OCSLA." *Fairfield Indus., Inc. v. EP Energy E&P Co., L.P.*, No. CV H-12-2665, 2013 WL 12145968, at *5 (S.D. Tex. May 2, 2013), report and recommendation adopted, No. CV 4:12-2665, 2013 WL 12147780 (S.D. Tex. July 2, 2013).

The parties' disagreement in *Fairfield Indus., Inc.* stemmed from an agreement to license previously collected seismic data from the Gulf of Mexico. *Id.* at *3. The court emphasized that because the contractual relationship centered around previously collected data, the party lacked the necessary connection to trigger OCSLA jurisdiction. *Id.* at *5.

An agreement to paint an "offshore spar floating production facility" went awry when testing established the presence of lead paint. *Dominion Expl. & Prod., Inc. v. Ameron Int'l Corp.*,

No. CIV.A. 07-3888, 2007 WL 4233562, at *1 (E.D. La. Nov. 27, 2007). This case is clearly distinguishable from [Client's] matter because the paint agreement and subsequent breach did not "arise[] out of an 'operation' involving the 'exploration, development, or production' of materials of the [OCS]." *Id.* at *2.

A breach of contract suit alleging defendant's failure to comply with price recalculation provisions in a purchase agreement failed to implicate OCSLA because the controversy was "exclusively over the price of gas which ha[d] been produced…[which] simply does not implicate the interest expressed by Congress in the efficient exploitation of natural resources on the OCS." *Brooklyn Union Expl. Co. v. Tejas Power Corp.*, 930 F. Supp. 289, 289-92 (S.D. Tex. 1996). [Client's] dispute differs substantially. The [Client] actively exploits and transfers natural resources from a clearly identified OCSLA situs (seabed) to the mainland for processing.

The Eastern District of Louisiana held that OCSLA did not govern a dispute over processing fees for services already rendered. *NCX Co., LLC v. Samedan Oil Corp.*, No. CIV.A. 03-3284, 2004 WL 203079, at *1 (E.D. La. Jan. 28, 2004). A contractual relationship soured over an alleged overcharge for facility use of $1.2 million. *Id.* at *1. The court employed similar logic to the holding in *Brooklyn Union*. Performance under each contract was rendered, and lacked the necessary nexus to the exploitation of minerals. The court noted this litigation "ha[d] nothing to do with [defendant's] future operations." *Id.* at *3.

Although case law barring OCSLA jurisdiction exists, it does not prevent its application in this case. *El Paso E&P Co.* distinguishes [Client's] case, and *Brooklyn Union* and *NCX Co.* noting, both cases preceded *Grand Isle Shipyard* and failed to apply the "focus-of-the-contract test." *El Paso E&P Co.*, No. 2:09-CV-1753, 2010 WL 11575513, at *8. Even without the application of

the "focus-of-the-contract test" both contrarian cases "involved payment for services or finished products rendered." *Id.* Here [Client's] contractual relationship with [Party] remains ongoing, and the services contemplated by the contract were the development of OCS materials.

CONCLUSION

Fifth Circuit precedent confirms that OCSLA applies broadly. Following the passage of OCSLA, its purpose was to "allocate to the federal government jurisdiction, control and power of disposition over the subsoil and seabed of the Outer Continental Shelf." *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013). Although [Client's] action is purely contractual in nature, OCSLA's wide reach governs their dispute for three separate reasons.

First, [Client's] action clearly falls under OCSLA's jurisdictional grant because it involves the development or production of minerals from the seabed of the OCS. 43 U.S.C. § 1349(b)(1)(A). [Client] transports materials via a pipeline that is permanently attached to the seabed of the OCS in the [Redacted]. The Act covers "a wide range of activity occurring beyond the territorial waters of the states on the outer continental shelf of the United States." *Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prod. Co.*, 448 F.3d 760, 768 (5th Cir.), amended on reh'g, 453 F.3d 652 (5th Cir. 2006).

Second, [Client] fulfills prong one of the *LPT* test for an OCSLA situs. *PLT Eng'g, Inc.*, 895 F.2d at 1045. The Fifth Circuit uses the "focus-of-the-contract test" to determine if the contractual controversy arises on an OCSLA situs. Fifth Circuit precedent shows that incidents that do not physically touch an OCSLA situs (*Grand Isle Shipyard*) or involve onshore facilities (*W & T Offshore* and *El Paso E&P Co.*) remain governed by OCSLA's extensive reach. [Client's] claim to OCSLA jurisdiction proves strong in comparison because the pipeline is clearly an

OCSLA situs. It is permanently attached to the seabed and directly located on the OCS rather than further inland. Additionally, the purpose of the ongoing contractual relationship centered around the development and production of OCS minerals.

Finally, contrary case law fails to derail OCSLA jurisdiction because [Client's] case proves distinguishable. If [Client's] contractual relationship lacked active and ongoing performance, *Brooklyn Union* and *NCX Co.* would deserve further inquiry. However, each case's significance is lessened by the Fifth Circuit's continued reliance on the "focus-of-the-contract test" established in *Grand Isle Shipyard*. Moreover, [Client's] contract involves both active and future production, differentiating itself from *NCX Co.* There, the court dismissed OCSLA jurisdiction because the litigation had "nothing to do with future operations." *NCX Co., LLC*, No. CIV.A. 03-3284, 2004 WL 203079, at *3. The Southern District of Texas decided *Brooklyn Union* thirteen years prior to *Grand Isle Shipyard*. Additionally, [Client's] dispute also differs significantly from the facts of *Brooklyn Union*. There the court noted that "controversy exclusively over the price of gas which has been produced…simply does not implicate the interest expressed by Congress in the efficient exploitation of natural resources on the OCS." *Brooklyn Union Expl. Co.,* 930 F. Supp. at 292.

[Client's] dispute is tailor-made for OCSLA jurisdiction. [Client's] pipeline is a permanent structure connected to the "subsoil or seabed" and the "focus-of-the-contract" involves the current and future production, exploration, or development of OCS materials on an OCSLA situs. In fact, lower courts extended OCSLA jurisdiction to disputes in Houston office buildings and onshore processing facilities. *See W & T Offshore, Inc.*, 918 F. Supp. 2d at 604; *El Paso E&P Co.*, No. 2:09-CV-1753, 2010 WL 11575513, at *2. Therefore, OCSLA governs this purely contractual dispute and the Fifth Circuit should apply the substantive law of the adjacent [State].

Applicant Details

First Name	**Cory**
Middle Initial	**D**
Last Name	**Conley**
Citizenship Status	**U. S. Citizen**
Email Address	**coryconley@gmail.com**
Address	**Address** Street **1605 Church St, Apt 7071** City **Decatur** State/Territory **Georgia** Zip **30033** Country **United States**
Contact Phone Number	**6463974332**

Applicant Education

BA/BS From	**New York University**
Date of BA/BS	**May 2006**
JD/LLB From	**Emory University School of Law** **https://law.emory.edu/index.html**
Date of JD/LLB	**May 6, 2024**
Class Rank	**10%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Jessup International Law Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **No**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Volokh, Alexander
avolokh@emory.edu
626-354-4581
Yoshino, Kenji
kenji.yoshino@nyu.edu
212-998-6421
Jacobi, Tonja
tonja.jacobi@emory.edu
(773) 251-5455

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Cory Conley
1605 Church Street, Apt 7071
Decatur, GA 30033

June 11, 2023

The Honorable Juan R. Sánchez
United States District Court
Eastern District of Pennsylvania
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am a rising third-year student at Emory University School of Law, and I am writing to apply for a 2024-25 term clerkship in your chambers. Upon graduation, I look forward to practicing in the Philadelphia area, where I currently serve in a summer associate position.

As an aspiring litigator with several years of legal research and writing experience, I believe I would make a strong addition to your chambers. Last summer, during my internship with the Appeals Bureau of the Queens District Attorney's Office in New York, I got the chance to research and write state criminal appellate briefs that, with editing, were filed directly in court. The opportunity to see that process from the other side would be enormously valuable, and I would be glad to apply my skills to the work of the Court.

Thank you for considering my application. I look forward to hearing from you about the possibility of arranging an interview. You can reach me at 646-397-4332 or cory.conley@emory.edu.

I have enclosed a copy of (1) my resume, (2) a law school transcript, (3) an undergraduate transcript, and (4) a writing sample. Recommendations will attach from NYU Law Professor Kenji Yoshino, and Emory Law Professors Tonja Jacobi and Alexander (Sasha) Volokh.

Sincerely,

Cory Conley

CORY CONLEY

1605 Church St, Apt 7071, Decatur GA, 30033
cory.conley@emory.edu | 646-397-4332

EDUCATION

Emory University School of Law — **Atlanta, GA**
Candidate for Juris Doctor — May 2024
- GPA: 3.757; Honors: Top 10% of Class (Dean's List); Top Grade in Criminal Procedure (Dean's Award)
- Activities: Emory Law Moot Court Society (Philip C. Jessup International Law Moot Court Competition Team), *Member* | Emory Free Speech Forum, *Founding Treasurer* | OUTLaw, *Member* | Emory Law Supreme Court Advocacy Program, *Member of Circuit Split Committee*

New York University — **New York, NY**
Bachelor of Fine Arts — May 2006

EXPERIENCE

Kessler, Topaz, Meltzer & Check LLP — **Radnor, PA**
Summer Associate — May-August 2023
- Provide legal research and writing in support of plaintiff-side litigation regarding securities, corporate governance and consumer protection matters, including motions and memoranda; cite-check appellate and trial briefs.

Professor Tonja Jacobi, Emory University School of Law — **Atlanta, GA**
Research Assistant — January 2023-present
- Assist in editing and preparing new Criminal Procedure casebook.

Queens County District Attorney's Office — **Queens, NY**
Summer Law Internship — June-August 2022
- Conducted legal research and prepared drafts of appellate motions and briefs, including excessive sentence motions and appeal waiver claims.

Professors Julie Schwartz and Karen Cooper, Emory University School of Law — **Atlanta, GA**
Research Assistant — May-December 2022
- Conducted legal research and draft an appellate record for the Introduction to Legal Advocacy course.

New York University School of Law — **New York, NY**
Faculty Support — May 2015 – July 2021
- Performed research and administrative work for law professors
- Assisted with research on academic legal topics including Property, Bankruptcy, and Environmental Law.

Freelance Playwright/Lyricist — **New York, NY**
Writer — January 2007 – July 2021
- Wrote plays and musicals, presented via productions and workshops in New York.
- Won the Overall Excellence Award for Best Play at the NY International Fringe Festival in 2011.

Dobbs Ferry School District — **Dobbs Ferry, NY**
Teaching Assistant — September 2010 – March 2015
- Supported students with disabilities in a general educational setting.
- Served as faculty advisor to Student Gay/Straight Alliance, implementing a "Respect for All" week.
- Served as musical director for both middle and high school musical theater productions.

COMMUNITY SERVICE

Atlanta Volunteer Lawyers Foundation, Atlanta, Georgia. January 2022-present.
Art for Refugee Children Project, Istanbul, Turkey. August 2018-present.

Advising Document - Do Not Disseminate

Name: **Cory Conley**
Student ID: **2540260**

Institution Info: Emory University
Student Address: 1605 Church St Apt 7071
Decatur, GA 30033-6083
Print Date: 05/31/2023

Beginning of Academic Record

Fall 2021

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	505	Civil Procedure	4.000	4.000	A	16.000
LAW	510	Legislation/Regulation	2.000	2.000	A-	7.400
LAW	520	Contracts	4.000	4.000	A	16.000
LAW	535A	Intro.Lgl Anlys, Rsrch & Comm	2.000	2.000	A-	7.400
LAW	550	Torts	4.000	4.000	A	16.000
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	599B	Career Strategy & Design	0.000	0.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.925	Term Totals	16.000	16.000	16.000	62.800
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.925	Comb Totals	16.000	16.000	16.000	62.800
Cum GPA	3.925	Cum Totals	16.000	16.000	16.000	62.800
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.925	Comb Totals	16.000	16.000	16.000	62.800

Spring 2022

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	525	Criminal Law	3.000	3.000	B	9.000
LAW	530	Constitutional Law I	4.000	4.000	A	16.000
LAW	535B	Introduction to Legal Advocacy	2.000	2.000	A-	7.400
LAW	545	Property	4.000	4.000	A-	14.800
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	633	Family Law	3.000	3.000	A-	11.100

			Attempted	Earned	GPA Units	Points
Term GPA	3.644	Term Totals	16.000	16.000	16.000	58.300
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.644	Comb Totals	16.000	16.000	16.000	58.300
Cum GPA	3.784	Cum Totals	32.000	32.000	32.000	121.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.784	Comb Totals	32.000	32.000	32.000	121.100

Fall 2022

Program: Doctor of Law
Plan: Law Major

Advising Document - Do Not Disseminate

Name: **Cory Conley**
Student ID: **2540260**

Course		Description	Attempted	Earned	Grade	Points
LAW	500X	Business Associations	3.000	3.000	A-	11.100
LAW	622A	Const'lCrim.Proc:Investigation	3.000	3.000	A+	12.900
LAW	632X	Evidence	3.000	3.000	A-	11.100
LAW	648	Adv'd Legal Writing & Editing	2.000	2.000	S	0.000
LAW	708	Law and Religion	3.000	3.000	A-	11.100
Course Topic:		Theories,Methods, & Approaches				

			Attempted	Earned	GPA Units	Points
Term GPA	3.850	Term Totals	14.000	14.000	12.000	46.200
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.850	Comb Totals	14.000	14.000	12.000	46.200
Cum GPA	3.802	Cum Totals	46.000	46.000	44.000	167.300
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.802	Comb Totals	46.000	46.000	44.000	167.300

Spring 2023

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	671	Trial Techniques	2.000	2.000	S	0.000
LAW	702	Antitrust	3.000	3.000	S	0.000
LAW	721	Federal Courts	3.000	3.000	B+	9.900
LAW	747	Legal Profession	3.000	3.000	B	9.000
LAW	830A	SEM: Supreme Ct. Oral Argument	3.000	3.000	A+	12.900
LAW	887	Moot Court	2.000	2.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.533	Term Totals	16.000	16.000	9.000	31.800
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.533	Comb Totals	16.000	16.000	9.000	31.800
Cum GPA	3.757	Cum Totals	62.000	62.000	53.000	199.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.757	Comb Totals	62.000	62.000	53.000	199.100

Fall 2023

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	622B	Criminal Proc: Adjudication	3.000	0.000		0.000
LAW	675	Constitutional Lit	3.000	0.000		0.000
LAW	683	White Collar Crime	3.000	0.000		0.000
LAW	715	Law & The Unconscious Mind	3.000	0.000		0.000

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	12.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	12.000	0.000	0.000	0.000

Advising Document - Do Not Disseminate

Name: **Cory Conley**
Student ID: **2540260**

Cum GPA	3.757	Cum Totals	74.000	62.000	53.000	199.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.757	Comb Totals	74.000	62.000	53.000	199.100

Law Career Totals

Cum GPA:	3.757	Cum Totals	74.000	62.000	53.000	199.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.757	Comb Totals	74.000	62.000	53.000	199.100

End of Advising Document - Do Not Disseminate

EMORY

SCHOOL OF
LAW

Date: June 11, 2023

Dear Judge Sanchez:

I am writing to recommend Cory Conley for a clerkship. I got to know Cory in Fall 2021, when I was teaching Torts and he was a first-semester 1L in my class. Cory made intelligent comments in class, did very well on the practice midterm, and ultimately got an A in the class. Unsurprisingly, he's the top 10% of his class. But Cory is impressive in other ways as well. He's older than most law students because he graduated from college about 15 years ago. This makes him more mature than most students, and it's clear that he didn't go to class (as some students do) just by default or without knowing what he wanted to do with his life. This also makes him more intellectually curious than most. He's a hard worker and makes an effort to not only get the big picture right but also be concise, as well as accurate about details.

He spent his time after college being a playwright — I haven't read any of his plays, but I know he won the award for Best Play at the New York International Fringe Festival in 2011. He also worked at NYU Law School, doing research and administrative work. While there, he wrote diversity scripts for Scholastic, Inc. as part of the work of NYU's Center for Diversity, Inclusion, and Belonging. He helped create a nonprofit called the Art for Refugee Children project, and as part of this project, he traveled to Turkey three times.

Since being in law school, he's been a research assistant for several professors and has summered at a DA's office and a law firm, and has been on Moot Court and a member of the Emory Law School Supreme Court Advocacy Program. I've also had the pleasure of having him as a student in my Antitrust Law course.

As if all this weren't enough, I've also come to know him as an independent thinker outside of class. Though he has strong views of his own, this doesn't prevent him from being eager to debate and to engage with a variety of different points of view; his best friend at law school has opposite politics from him. During his first two years, he tried hard to promote dialogue between different sides, helped found the Emory Free Speech Forum, and was instrumental in getting former ACLU president Nadine Strossen to visit campus.

Emory University
Gambrell Hall
1301 Clifton Road
Atlanta, Georgia *30322-2770*
An equal opportunity, affirmative action university

Tel 404.727.6816
Fax 404.727.6820

In short, Cory would be an excellent clerk; I can't speak highly enough of him. Please give me a call at 626-354-4581 if you want to discuss his case further.

Sincerely,
Alexander "Sasha" Volokh
Associate Professor

New York University
A private university in the public service

School of Law

40 Washington Square South, Room 501
New York, NY 10012-1099
Telephone: (212) 998-6421
Facsimile: (212) 995-3662
E-mail: kenji.yoshino@nyu.edu

Kenji Yoshino
Chief Justice Earl Warren Professor of Constitutional Law
Faculty Director of the Meltzer Center for Diversity, Inclusion, and Belonging

Date: June 11, 2023

Dear Judge Sanchez:

I am pleased to recommend Cory Conley, a third-year student at Emory Law School, for a clerkship in your chambers. This letter is somewhat unusual, as Cory was not my student, but rather my administrative assistant at NYU School of Law from 2015 to 2021. I worked closely with him in that capacity, strongly supported his application to law school, and have kept in touch with him over the years. I am confident in commending him without reservation.

I suppose some legal professionals still think of administrative assistants as individuals who perform relatively ministerial jobs. Such folks must never have been graced with the kind of assistant that Cory was to me. It is true that no task was too small for Cory—he managed student on-call lists, proofread recommendation letters, and scheduled appointments without dither or angst. At the same time, no task was too big for him either—he handled students with sensitive emotional issues, gave me wise counsel on institutional and intellectual projects, and even helped me prepare Congressional testimony in favor of the Equality Act.

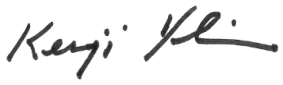
For all these reasons, I had a hard time adjusting to Cory's departure. Yet the better angels of my nature told me that his myriad gifts were exactly why I should support his application to law school. Cory is a true intellectual who deserved a larger platform for his talents. I am delighted but not at all surprised that he has distinguished himself in law school. He clearly loves the law, and it's been a particular pleasure to engage him as a more learned junior colleague in the profession. I was most recently the direct beneficiary of his wisdom when he carefully read my most recent book manuscript and gave me and my co-author trenchant feedback.

Having kept in touch with him during his law school years, I would further note three aspects of Cory's development as a member of the profession. First, Cory has a growth mindset. He has consistently "played to his weaknesses" in law school. For instance, he chose moot court over law review (Emory students may not do both) because he felt that his oral advocacy skills needed more work than his writing skills. Second, while he is a person of great conviction, Cory is entirely non-dogmatic. He has a classic liberal attitude that not only tolerates but welcomes opposing viewpoints, an attitude he sometimes

attributes to the fact that he is an older student. Finally, Cory is a lawyer's lawyer. His favorite classes in law school were Civil Procedure and Federal Courts. As that might reflect, he is fascinated by the nuts and bolts of litigation. I believe all three of these qualities will serve him well as a clerk.

If I were you, I would not hesitate!

Sincerely,



Kenji Yoshino

EMORY SCHOOL OF LAW

Tonja Jacobi
Professor and Sam Nunn Chair
in Legal Ethics & Professionalism

June 11, 2023

Re: Cory Conley

Dear Judge Sanchez:

I write to you with great enthusiasm in recommending Cory Conley for the position of judicial clerk. Cory is an exceptionally bright, thoughtful and professional law student whom I would very much like to see become an academic — he has that rare combination of intellectual excellence, persuasive writing skills, and a curious mind that makes him a perfect candidate for academia. But Cory could do many other things. I am sure he will be an excellent lawyer also. And meanwhile, he will be a marvelous law clerk to whichever judge is lucky and insightful enough to choose him.

In my first year here at Emory Law, Cory has been the standout student in both of my classes. And in my prior 19 years at Northwestern Law School, I had perhaps three students who were Cory's equal, one of whom just became an academic.

His written work is a pleasure to read — perhaps not surprising given that he used to be a playwright (and one who won the award for Best Play at the N.Y. International Fringe Festival in 2011). And his analysis is top-notch — he is the only student who perfectly answered every aspect of every question on my constitutional criminal procedure final exam. His oral presentation skills are excellent, too. Cory tells me that he chose to do Moot Court instead of law review (Emory only permits students to do one or the other) because he wanted to, in his words, "play to his weaknesses": knowing that he was a well-versed writer, he thought he should work on his oral skills. Whether he truly had a weakness before or not, he certainly does not now. Not only was he selected to compete in the Jessup International Law Team, but when he gave his required presentation in my Supreme Court oral argument and strategy class, he was once again the clear star of the class, in a very engaged classroom. His presentation on *Moore v. Harper* was so good that I suggested that he turn it into an Op Ed, something I have never been inspired to do in my more than 10 years of teaching this class. I offered to either guide him through the process or co-author with him. He chose the latter but took the first turn in writing. I made some revisions but he led the way, and Bloomberg have expressed interest in publishing it when the case comes down.

Cory's contributions in class were always of great value to me as a teacher. He has a breadth of knowledge of Supreme Court doctrine and history that is quite exceptional, even for a more mature student. He also seemed quite comfortable analyzing legal issues in a fair and reasoned way, whatever their political valence. In constitutional criminal procedure in particular, many of the topics are very polarizing and I force the students to argue against their own priors, telling them to put forward an argument from the point of view of the prosecution or the defense, on demand. Many students struggled to overcome their own political leanings but Cory had no trouble doing this and was always capable of coherently and persuasively arguing either side of any issue.

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It was at my suggestion that Cory take a Directed Research, either with me or with another professor, so that he could explore a given topic in depth and potentially write a publishable journal article. I was pleased that he chose to work with me and together we plan to write an article on the "law of democracy."

I think Cory likely possesses many of the technical skills needed to be a good law clerk. He wants to work in appellate litigation and describes his favorite classes (other than diplomatically referring to my own) as federal courts, federal/state relations and conflict of laws. He says he likes these topics because he is interested in the puzzle of the various barriers that courts have erected to the vindication of rights. He has also gained relevant experience working in the appellate division of the Queens County District Attorney's Office in New York, where he did somewhat analogous work, writing briefs in response to defense motions and helping the office research its litigation response to *Bruen* striking down New York's gun permit regime. Several N.Y. defendants immediately moved to have their convictions vacated given the ruling, and he helped research a memo arguing that the convictions should stand.

I could go on and would be happy to talk on the phone in more detail about Cory. I hope that it is clear from this short letter that I think Cory is a truly exceptional law student and would be a superb law clerk.

Sincerely,

CORY CONLEY

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WRITING SAMPLE

The following is an excerpt from a brief I wrote for the 2023 Philip C. Jessup International Law Moot Court Competition. The Jessup Competition is a simulation of a dispute between countries before the International Court of Justice (ICJ). The moot itself consists of arguing a hypothetical case on issues of international law as if before the ICJ. As a member of the "Applicant" side, I was tasked with producing one half of a written brief, rooting my argument in any number of international law cases and doctrines.

This excerpt encompasses the entirety of the first section of the two sections I wrote. (A factual background is included at the beginning of the excerpt.) At the competition, the brief received the 6th best score among all 30 Applicants from the Mid-Atlantic Region.

Written January 2023

196A

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2023 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

CASE CONCERNING
THE CLARENT BELT

THE KINGDOM OF AGLOVALE
(*APPLICANT*)

v.

THE STATE OF RAGNELL
(*RESPONDENT*)

MEMORIAL FOR THE APPLICANT

2023

FACTUAL BACKGROUND

This case revolves around the Clarent Belt, a region on the Gais Peninsula that is disputed between the neighboring states of Aglovale, Balan, and Ragnell. The Clarent War, which took place between 1951 and 1954, resulted in Ragnell gaining control of the Belt under the Trilateral Treaty of Lasting Peace (TLP). According to the treaty, Balan retained sovereignty over the Belt but leased it to Ragnell for 65 years. Ragnell was responsible for maintaining public order and providing government services in the Belt. Aglovale monitored the compliance of Balan and Ragnell with the treaty.

Tensions escalated in 2018 when Dan Vortigern became the president of Ragnell and expressed skepticism about TLP. This led to concerns among Ragnellians that Balan would impose harsh regulations on Ragnellian businesses after the lease expired. A Balani military veterans' group, known as the UAC, opposed any attempt by Ragnell to renege on the lease and conducted attacks against Ragnellian factories and law enforcement personnel in the Belt. President Vortigern initiated “Operation Shining Star” to eliminate the UAC “terrorist cells,” which resulted in Aglovale withdrawing its peacekeepers and the United Nations expressing concern over Ragnell's actions.

Tensions continued to escalate with further attacks, including the destruction of the Nant Gateway--- the only path into and out of the region--- and a bombing at Compound Ardan that killed civilians. Negotiations for the Belt’s transition to Balani control were supposed to begin in April 2022, but Ragnell refused to start discussions while the situation remained dangerous. Aglovale and Balan implemented targeted sanctions against Ragnell, and negotiations in Geneva failed to reach a settlement. Ragnell then filed a lawsuit against Aglovale in the International Court of Justice, and Aglovale indicated it would file counterclaims, invoking Article 41 of TLP as grounds for the court's jurisdiction. This brief was filed on behalf of Aglovale, which both sides agreed would be deemed the Applicant in the case.

PLEADINGS

I. RAGNELL VIOLATED ITS TLP OBLIGATIONS BY LAUNCHING OPERATION SHINING STAR ("OSS"), AND ATTACKING NANT GATEWAY AND COMPOUND ARDAN, AND MUST ACCORDINGLY PAY REPARATIONS TO AGLOVALE FOR THE DEATHS OF EIGHT OF ITS NATIONALS.

By launching OSS and attacking Nant Gateway and Compound Ardan ("**Ardan**"), Ragnell violated its obligations under the TLP and international law. Its initial Clarent Belt invasion was an attack on Balan's sovereignty, and its subsequent actions violated the treaty.

A. This Court has jurisdiction to rule on all issues presented in this claim.

The Court has emphasized its obligation to decide, noting that it is the Court's duty "to give the fullest decision it may in the circumstances of each case."[1] Here, the Court has jurisdiction to decide the dispute between Aglovale and Ragnell.

1. Balan is not a necessary party to this dispute because this Court's judgment would not affect Balan's legal interests.

    a. The *Monetary Gold* Principle is Inapplicable Here.

In *Monetary Gold,* the Court held that it could not allow proceedings without a State's consent if the third party's legal interests "would form the very subject matter of the decision."[2] Balan's legal interests will not form the subject matter of a judgment here, as OSS does not require ruling on Balan's international responsibility, and Ragnell's bombings of Nant and Ardan do not implicate Balan. In these circumstances, a third party's refusal to intervene "in no way precludes the Court from adjudicating upon claims submitted to it."[3]

    b. If *Monetary Gold* Does Apply, it Should be Set Aside.

---

[1] *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)* 1984 I.C.J. 3 (21 March) ¶ 40; Judge Weeramantry's Dissent in *Case Concerning East Timor (Portugal v. Australia)* 1995 I.C.J. 90 (30 June), ["***East Timor***"].

[2] *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), 1954 I.C.J., p. 17 ["**Monetary Gold**"]

[3] *Certain Phosphate Lands in Nauru* (Nauru v. Australia), 1992 I.C.J. 240 (26 June), ¶ 54.

If the *Monetary Gold* principle applies, it should be set aside.[4] That principle "privileges the consent of absent third parties and thereby improperly directs the Court to refuse to decide cases over which it has jurisdiction."[5]

2. Even if a decision would affect Balan's legal interests, Balan's consent to this Court's jurisdiction is sufficient.

Consent precludes application of the *Monetary Gold* principle. Consent may be inferred from actions, including the acceptance of a treaty providing for jurisdiction.[6] In *Nicaragua*, the Court inferred consent since both States were Party to the ICJ Statute[7] and agreed to submit to the Court's jurisdiction.[8] Additionally, in the *Iranian Hostages* case, this Court found jurisdiction via Article 1 of the Optional Protocols concerning the Compulsory Settlement of Disputes, which provided ICJ jurisdiction over disputes arising out of the Conventions' interpretation or application.[9]

Here, although Balan declined to intervene, it remains bound by the TLP.[10] Accordingly, this Court may render decisions that affect Balan's interests.[11] By its terms, TLP does not distinguish between disputes involving all three treaty parties and disputes involving only two.[12] Rather, the TLP establishes that when a dispute is submitted to the ICJ, "all Parties" accept ICJ jurisdiction.[13]

B. OSS is unlawful under the TLP.

1. OSS violated Ragnell's obligation to respect Balan's sovereignty and territorial integrity.

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[4] Dapo Akande, *Introduction To The Symposium On Zachary Mollengarden & Noam Zamir's "The Monetary Gold Principle: Back To Basics,"* AJIL Unbound, 2021.
[5] Zachary Mollengarden & Noam Zamir, *The Monetary Gold Principle: Back to Basics*, 115 AJIL 41 (2021).
[6] ICJ Statute, Art. 40; Rules of Court, Art. 38.
[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 1986 I.C.J. 14, ¶ 125 (27 June) ["***Nicaragua***"].
[8] *Id.*
[9] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* 1980 I.C.J. 3 (24 May) ["***Iranian Hostages***"].
[10] Statement of Agreed Facts, ¶ 10 ["**SOAF**"].
[11] *Iranian Hostages, supra* n9.
[12] Trilateral Treaty of Lasting Peace, Art. 41 ["**TLP**"].
[13] *See generally* TLP.

International law prohibits acts of aggression. Ragnell's invasion of the Clarent Belt was an act of aggression against Balan's "territorial integrity," a violation of the TLP's purpose of achieving peace and stability, and a breach of its explicit obligations.[14] Respect for territorial sovereignty is essential to international relations.[15] Because "border disputes between states are so frequent that any exception to the [prohibition against the use of force] for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law," an aggressive use of force may still be unlawful even when taken on territory to which the aggressor State had a legitimate claim.[16] Further, it is unlawful when foreign forces legally present in the nation go beyond the parameters of their permitted stay or past the specific agreement's expiration.[17]

a. Ragnell did not act in lawful self-defense.

U.N. Charter Article 51 recognizes a State's right to use force in self-defense. Nonetheless, lawful self-defense presupposes "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[18] Ragnell cannot show that its military actions meet that standard. Further, this Court recognized that self-defense is available to respond to other threats from other States, but not for "threats originating from within the occupied territories and was not imputable to another state."[19] A similar situation exists here.

2. This was an armed conflict, and international humanitarian law ("**IHL**") applies.

IHL applies in armed conflict,[20] which exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized

[14] United Nations, *Charter of the United Nations*, 1 UNTS XVI (26 June 1945), Article 2(4), ["**U.N. Charter**"].
[15] *Nicaragua*, *supra* n7, ¶¶ 14, 76, 109–10.
[16] Partial Award, *Jus Ad Bellum*, Ethiopia's Claims 1–8, 2005, ¶ 10; Also cited by the arbitral tribunal in *Guyana v. Suriname* (17 September 2007), ¶ 423.
[17] Malcolm N. Shaw, *International Law* (8th ed. 2017), p. 858 ["**Shaw**"]
[18] Note of US Secretary of State Daniel Webster dated 24 Apr. 1841, in *Caroline* Case; *Case Concerning Oil Platforms (Iran v. US)* 2003 I.C.J. 161 (6 November).
[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136 (9 July), ¶ 139 ["**Construction of a Wall**"].
[20] Ben Saul & Dapo Akande, *The Oxford Guide to International Humanitarian Law*, 1st ed. (2020).

armed groups within a State."[21] Here, Ragnell resorted to armed force in its acts of aggression in the Clarent Belt through its attack on Nant Gateway and Ardan.[22]

a. Ragnell effectively controlled the Belt as an occupier and must justify its action under *jus ad bellum*..[23]

IHRL applies during occupation.[24] This includes "the duty to secure respect for the applicable rules of international human rights law and IHL, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third state."[25] This Court also emphasized that many human rights treaties govern State parties' behavior when they exercise their sovereign authority over foreign territory and that in such circumstances, the applicable *lex specialis*, IHL, will be used to decide the case.[26]

b. Ragnell violated the right of self-determination.

International law recognizes the right of "all peoples" to self-determination, which "may include the resort to armed force to achieve it."[27] States may not use force to deprive peoples of their right to self-determination. Ragnell violated this obligation by using force against the UAC fighters, who are members of an indigenous peoples subject to Ragnell's foreign control over the Belt, and who lacked any effective means of governmental participation in the territory's administration.

3. OSS violated Ragnell's treaty obligations to end hostilities.

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[21] J. Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Geneva*, 1952, vol. I, p. 29 ["**Pictet**"].
[22] SOAF, ¶¶ 31, 41, 47.
[23] *Al-Skeini v. Secretary of State for Defence*, U.K. House of Lords. (2007) (recognizing States owe IHRL obligations to all persons under their jurisdiction); *Western Sahara*, 1975 I.C.J. 12 (16 October) (establishing the law of occupation applies when a State exhibits effective control over territory).
[24] *Armed Activities on the Territory of the Congo (DRC v. Uganda),* 2005 I.C.J. 168; *Construction of a Wall, supra* n19.
[25] Françoise Bouchet-Saulnier, *The Practical Guide to Humanitarian Law* (2013).
[26] Shaw, *supra* n3*,* p. 901; *See also Construction of a Wall*, *supra* n19, pp. 136, 178.
[27] François Bugnion, *Jus Ad Bellum, Jus In Bello And Non-International Armed Conflicts*, Yearbook of International Humanitarian Law, vol. VI (2003), pp. 167-198; U.N. Charter, *supra* n14, Art. 1(2) and Art. 55; U.N. Resolutions 1514 (XV) 1960, 2621 (XXV) 1970, 2625 (XXV) 1970, 2674 (XXV) 1970, 2852 (XXVI) 1971 and 3103 (XXVIII) 1973; ICJ Statute, Artic 8(2)(c).

The Clarent Belt invasion was a violation of Ragnell's commitment to "terminate all armed hostilities" between Ragnell and Balan.[28] The *rebus sic stantibus* principle is inapplicable because the absence of militant fighters was not an "essential basis of the consent of the parties to be bound," and the existence of those forces does not "radically… transform the extent of obligations still to be performed under the treaty."[29] Additionally, the existence of an armed conflict does not, by itself, suspend the operation of treaties.[30] The TLP thus remained in full force during Ragnell's invasion, and Ragnell was in clear violation.

4. OSS breached Ragnell's obligation to respect the Clarent Belt as a demilitarized zone.

Extending military operations to areas which States granted the status of "demilitarized zone" is a clear international law violation.[31] Ragnell's military invasion of the Belt violated this principle and explicitly breached its TLP obligation to demilitarize the Clarent Belt.[32]

Ragnell's invasion exceeded the scope of its delegated territorial powers,[33] as Ragnell's military actions are not normal police actions[34] or law enforcement activities.[35] Therefore, the TLP does not grant an exception to Ragnell to initiate OSS. Ragnell's ability to use force in the Belt is strictly limited to "police force," as opposed to a "peacekeeping force," which is a power reserved to Aglovale.[36]

C. Ragnell's attacks on Nant Gateway and Compound Ardan violated the TLP.

1. The Nant Gateway attack violated the TLP.

[28] TLP, Part II, Art. 3.
[29] United Nations, *Vienna Convention on the Law of Treaties*, Treaty Series, vol. 1155, p. 331 (May 1969), Art. 62 ["**VCLT**"].
[30] ILC Draft Articles on the Effects of Armed Conflicts on Treaties, Art. 3, A/66/10, Add. 1, 2011.
[31] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 60, 8 June 1977 ["**API**"].
[32] TLP, *supra* note 12, at Art. 14.
[33] *Id.* at Art. 11.
[34] U.N. Charter, *supra* n14, Chapter VII.
[35] TLP, Art. 11(1)(c), 11(1)(d).
[36] *Id.* at Art. 6.

By destroying the only route into the Eamont Thruway, Ragnell violated its obligation to "protect and preserve" the Thruway and violated the TLP.[37]

a. The Nant Gateway attack violated IHL and IHRL.

The targeting of Nant Gateway violated Ragnell's obligation to respect and adhere to IHL and IHRL.[38] IHL obliges States to limit their operations to avoid causing significant harm or damaging civilian populations.[39] When carrying out military activities, "constant care shall be taken to spare the civilian population, civilians and civilian objects."[40] Further, IHL prohibits acts of "collective punishment."[41] Assuming a self-defense rationale, under IHL, an attack must be proportional and the military aim cannot be outweighed by the detrimental civilian impact.[42]

The destruction of Nant Gateway was not proportional and was an act of collective punishment prohibited by international law.[43] The Nant Gateway bombing had detrimental consequences for civilians, and the principle of proportionality requires the military objective of bombing the Nant Gateway to outweigh such severe and detrimental impacts to civilians. When comparing the military aims and objectives to the harm to the civilian population, it is clear that the harm to civilians outweighed any military benefit Ragnell gained by destroying it. Therefore, the Nant Gateway attack amounts to an act of collective punishment, which is prohibited under international law.

3. The Ardan attack violated the TLP.

a. Ragnell violated IHL by attacking Ardan without taking all feasible precautions.

To minimize unnecessary suffering for civilians, IHL imposes a duty on States to take all feasible precautions before launching an attack. A State planning an attack must do everything

[37] *Id.* at Art. 15
[38] *Id.* at Part I.
[39] API, *supra* n32, Art. 48.
[40] API, *supra* n32, Art. 57.
[41] Hans-Heinrich Jeschek., *Collective Punishment*, *Encyclopedia of Public International Law* (1982).
[42] AP I, *supra* n32, at Art. 48.
[43] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, Common Article 33 ["**Fourth Geneva**"].

feasible to verify that the objects of attack are military targets, not civilian, and also take "all feasible precautions" to avoid and minimize incidental loss to civilian life.[44]

Ragnell failed to take all feasible precautions before bombing Ardan. Its reliance on the informant was unjustified and did not constitute sufficient due diligence. Ragnell took no action to verify the informant's report or confirm the informant's reliability. In addition, Ragnell offered no indication of what specific data it relied on in "conclud[ing]" that civilians were not present at the Compound.[45] Ragnell's error was a "mistake of fact," which may or may not have been an "honest" one, but it was not a "reasonable" one. It thus violated the "specific rules" of IHL.[46]

b. The Ardan attack violated the "right to life" under IHRL.

In addition, Ragnell owed IHRL obligations to persons under its control,[47] and its control extended to the Clarent Belt after OSS. Thus, Ragnell violated the "right to life"[48] of the eight Aglovalean nationals when it conducted military operations without taking feasible precautions, resulting in their death.

D. Ragnell owes reparations to Aglovale for its killing of Eight Aglovalean nationals at Ardan.

Internationally wrongful acts demand reparation to the injured party. States are required to pay full restitution under civil law for harmful acts or omissions that are attributable to them and a violation of an international commitment they owe.[49] Indeed, "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[50] In addition, a State "shall be responsible for all acts committed by persons forming part of its armed forces."[51]

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[44] API, *supra* n32, Art. 57.
[45] SOAF ¶ 47.
[46] Marko Milanovic, *Mistakes of Fact When Using Lethal Force in International Law: Part I*, European Journal of International Law, at 3.
[47] *Al-Skeini*, *supra* n24.
[48] UNGA, *International Covenant on Civil and Political Rights*, UN Treaty Series, vol. 999, p. 171 (16 December 1966), Art. 6 ["**ICCPR**"].
[49] Asaf Lubin, *The Reasonable Intelligence Agency*, 47 YALE J. INT'L L. 119 (2022), at 136.
[50] *Case Concerning the Factory at Chorzów (Germany v. Poland)* 1927 P.C.I.J. Series A. – No. 9 (26 July) ["**Chorzow Factory**"].
[51] AP1, *supra* n32, Art. 91.

As noted above, the Aglovalean deaths were caused by Ragnell's failure to take feasible precautions, which is an internationally wrongful act, even if "unintended."[52] States cannot evade the obligation to compensate a harmed State by invoking justification or excuse, such as necessity.[53]

[52] Rebecca Crootof, *War Torts*, 97 NYU Law Review 1063 (2022), p. 1094.
[53] G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, Art. 31(1) (28 Jan. 2002).

Applicant Details

First Name	**Sean**
Last Name	**Connolly**
Citizenship Status	**U. S. Citizen**
Email Address	**sgc306@nyu.edu**
Address	**Address** Street **51 Cedar St** City **Brooklyn** State/Territory **New York** Zip **11221**
Contact Phone Number	**6313162477**

Applicant Education

BA/BS From	**Northeastern University**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law and Social Change**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Salama, Jerry
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sean Connolly
51 Cedar Street, Apt 4L
Brooklyn, NY 11221

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a rising third-year student at NYU School of Law, graduating in the spring of 2024. I am applying for a clerkship in your chambers starting in 2024, but I would also be interested in clerking during a later term.

My long-term goal is to work as a public-interest litigator, and it is important to me to work in a chambers that embodies an ethos of public service. I was drawn to your chambers because of your long history of work as a public defender.

Included in my application are my resume, unofficial transcript, and writing sample. My letters of recommendation will follow. For reference, my recommenders are:

Jerry Salama, Adjunct Professor of Law
Email: jerry.salama@nyu.edu
Phone: 212-280-3534 ext. 10
Professor Salama was my professor for the course “Land Use, Housing and Community Development in New York City.”

Julia McNally, Adjunct Professor of Clinical Law; Attorney-in-Charge, The Legal Aid Society, Queens Neighborhood Office
Email: JMcNally@legal-aid.org
Phone: 646-891-6236
Professor McNally was my supervisor during my externship with the Legal Aid Society.

Randy Hertz, Fiorello LaGuardia Professor of Clinical Law; Vice Dean, Curriculum
Email: randy.hertz@nyu.edu
Phone: 212-998-6434
Professor Hertz was my professor for the course “Criminal Law.”

Thank you so much for your time and consideration. I am happy to provide any additional information. My phone number is 631-316-2477 and my email is sgc306@nyu.edu.

Respectfully,

Sean Connolly

Sean Connolly
631-316-2477 | sgc306@nyu.edu

EDUCATION

New York University School of Law, New York, NY
Candidate for J.D., May 2024
Unofficial GPA: 3.722
Honors: Dean's Scholarship; Robert McKay Scholar (top 25% of class after four semesters)
Activities: N.Y.U. Review of Law & Social Change, *Staff Editor & Digital Editor*
Research, Education and Advocacy to Combat Homelessness, *Chair & Research Coordinator*
Law Students for Economic Justice, *Treasurer & Labor Coalition Organizer*
Disability Allied Law Students Association, *Event Coordinator*
Law and Political Economy Association, *Event Coordinator*
Public Interest Law Student Association, *2L Working Group Member*
Tenant Defense Collective, *Volunteer*

Northeastern University, Boston, MA
B.A. in English, *summa cum laude*, May 2018
Honors: Dean's Scholarship
Activities: Progressive Student Alliance (PSA), *Treasurer & Coalition Organizer*

EXPERIENCE

New York University, New York, NY
Civil Litigation - Employment Law Clinic, Fall 2023 - Spring 2024
Will assist in active employment litigation, most likely at the federal level. Will also simulate all stages of litigation of an employment discrimination case from meeting with clients to trial preparation.

New York Lawyers for the Public Interest, New York, NY
Legal Intern, Disability Rights, Summer 2023
Will assist in federal and state litigation, including class actions, to uphold the rights of individuals with disabilities.

Communities Resist, New York, NY
Legal Intern, Housing, January 2023 - April 2023
Drafted motions and petitions for affirmative, tenant-side litigation in Housing Court and the NYC Commission on Human Rights. Interviewed clients and attended tenant association meetings.

Legal Aid Society, New York, NY
Legal Extern, NYU Housing Clinic, September 2022 - December 2022
Under the supervision of clinical professors, represented low-income tenants facing eviction in all aspects of their cases in Manhattan and Queens Housing Court.

Northern Manhattan Improvement Corporation (NMIC), New York, NY
Legal Intern, Housing, June 2022 - August 2022
Researched and drafted a legal brief arguing that a proposed settlement agreement was in accordance with rent stabilization laws. Researched and drafted a motion for discovery with attached interrogatories and notice to produce requesting documents relating to the alleged deregulation of a rent-stabilized apartment. Reviewed, categorized, and prepared documentary evidence in preparation for trial. Observed oral arguments in housing court.

Research, Education and Advocacy to Combat Homelessness (REACH), New York, NY
Volunteer Researcher, September 2021 - May 2022
Researched and drafted a memo on succession rights in NYC cooperative housing under attorney supervision.

Nassau Suffolk Law Services, Islandia, NY
Volunteer, ***Housing Unit***, June 2021 - August 2021
Conducted intake interviews with tenants facing housing instability and eviction. Under direct attorney supervision, provided legal information and advice. Observed supervising attorney in housing court and client meetings.

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

Name:	**Sean G Connolly**
Print Date:	**06/08/2023**
Student ID:	**N11865814**
Institution ID:	**002785**
Page:	**1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Andrew Wade Williams			
Criminal Law		LAW-LW 11147	4.0	A
Instructor:	Randy Hertz			
Procedure		LAW-LW 11650	5.0	B+
Instructor:	Arthur R Miller			
Contracts		LAW-LW 11672	4.0	A
Instructor:	Kevin E Davis			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	Claudia Angelos Jason D Williamson			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Property		LAW-LW 10427	4.0	A-
Instructor:	Vicki L Been			
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Andrew Wade Williams			
Legislation and the Regulatory State		LAW-LW 10925	4.0	A-
Instructor:	Adam M Samaha			
Torts		LAW-LW 11275	4.0	A-
Instructor:	Catherine M Sharkey			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	Claudia Angelos Jason D Williamson			

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Land Use, Housing and Community Development in New York City Seminar		LAW-LW 10651	3.0	A
Instructor:	Sarah S Gerecke Jerry J Salama			
Constitutional Law		LAW-LW 11702	4.0	A-
Instructor:	Kenji Yoshino			
Directed Research Option B		LAW-LW 12638	1.0	NR
Instructor:	Vicki L Been			
Housing Law Externship		LAW-LW 12648	3.0	CR
Instructor:	Julia A Millstein Mun M. Clifford			
Housing Law Externship Seminar		LAW-LW 12649	2.0	CR
Instructor:	Julia A Millstein Mun M. Clifford			

	AHRS	EHRS
Current	13.0	12.0
Cumulative	43.0	42.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Employment Law		LAW-LW 10259	4.0	A-
Instructor:	Cynthia L Estlund			
Negotiation		LAW-LW 11642	3.0	B+
Instructor:	Claire E James			
Labor Law		LAW-LW 11933	3.0	A
Instructor:	Wilma Beth Liebman			
Urban Environmental Law and Policy Seminar		LAW-LW 12603	2.0	A-
Instructor:	Danielle H Spiegel Katrina M Wyman			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	55.0	54.0

McKay Scholar-top 25% of students in the class after four semesters
Staff Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

New York University
A private university in the public service

School of Law

130 West 30th Street, 19th Floor
New York, New York 10001
Telephone: (212) 932-2388
Fax: (212) 932-2389

Jerry J. Salama
Adjunct Professor of Law

May 16, 2023

RE: Sean Connolly, NYU Law '24

Your Honor:

I am writing to strongly support Sean Connolly's application for a judicial law clerk position in your chambers. Sean was my student in the Fall of 2022 in a seminar that I teach at New York University Law School entitled "Land Use, Housing and Community Development in New York City." The curriculum covers the full panoply of housing, land use, environmental and financial issues that are faced in community development today. As a small seminar limited to 18 students, I had the opportunity to observe and evaluate Sean's work closely.

Of course, Sean completed all the requirements of the seminar and contributed productively to the conversation with his classmates, receiving a grade of "A" in the class. He is, however, one of the clearest thinkers that I have encountered. He is not daunted by the insoluble issues facing society. Sean is able to think through complex issues and parse them into understandable components that he analyzes rationally. His arguments are well-organized and flow logically.

One of the requirements of the seminar gave me the opportunity to experience these skills closely. Students are required to prepare final papers and presentations in groups of three, focusing on critical and cutting-edge issues in the field of housing and community development. The groups are comprised of law students and graduate policy and planning students from the Wagner School of Public Service. Sean brought his intellect and energy to this project, preparing a paper entitled "Fair Share Planning for Locally-Undesirable Land Uses (LULUs)." He analyzed the thorny issue faced by municipalities as they site land uses critical to the function of a locality but opposed by most communities because of either actual or perceived externalities. He focused on the legal procedure used in New York City and the documented history of its misuse to the disadvantage of racial minorities. Sean and his co-authors then studied three specific types of LULUs—homeless shelters; detention facilities and waste transfer stations, reviewing litigation, community opposition and agency/political processes for each. I was the faculty adviser for this paper and I watched it evolved over one semester into a sophisticated, non-political analysis with Sean's creative leadership of his groupmates. Surprisingly for a law student, he was as comfortable analyzing data as he was parsing administrative procedures and causes of action in the ensuing litigation. Most

gratifying, Sean produced actionable recommendations that would advance the practice in this subject area and achieve multiple public goals. Given the importance of their analysis and proposals, I have urged this group to pursue publication of the paper in a journal.

With little faculty guidance, Sean and his group members transformed a project plan into realistic research questions and produced a clear, well-written, organized method for analyzing these issues. Law students are often not accustomed to working in groups to cooperate in producing coherent research projects. Sean showed the maturity and dedication to produce a first-quality product with his classmates where they all enjoyed the process. In producing the paper and in making a presentation to the entire class of the results of his research, Sean exhibited the rare ability to both understand the depth of complex information and to explain the ideas clearly and concisely. He is a persuasive and well-organized speaker.

Even as a young person, Sean has shown a dedication to work as a public interest lawyer which it is clear he will pursue as a career. His work at NY Lawyers for the Public Interest, Communities Resist, the Legal Aid Society and Northern Manhattan Improvement Corp. evince a consistent commitment of a lawyer to protect and defend individual rights, especially those of the disadvantaged. He puts his time and his effort into direct services to advance the causes of his heart and his mind while thinking strategically about larger initiatives for social change. As a practitioner in the field, we have discussed housing law and land use issues and this seems to be his passion and expected career path.

I have no doubt that his research and writing skills combined with his ability to quickly comprehend areas of the law that are new to him will make Sean an ideal judicial clerk. I am confident that Sean Connolly brings the intellectual rigor, ethical responsibility and academic/employment background to be an excellent judicial clerk.

Sincerely,

Jerry J. Salama
Adjunct Professor of Law

THE LEGAL AID SOCIETY
CIVIL

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Adriene Holder
Chief Attorney
Civil Practice

Julia McNally
Attorney–in–Charge
Queens Neighborhood Office

May 25, 2023

Re: Clerkship Recommendation for Sean Connolly, NYU Law

Your Honor:

This letter serves as a recommendation for Sean Connolly for a Judicial Clerkship. Mr. Connolly was a student in a Housing Clinic at NYU I taught this past Fall and, through that clinic, served as an extern in Legal Aid's Queens Housing Practice. Mr. Connolly impressed me with his commitment, work ethic, and critical thinking skills, qualities which would allow him to superbly serve the Court and litigants as a judicial clerk.

Mr. Connolly handled several challenging housing court cases over the course of the semester, often volunteering to take on additional work that required him to master new areas of law under tight deadlines. For example, even though our clinic was based in Queens and New York Counties Housing Courts, he sought permission to represent a participant in NYU's Prison Education Program who was facing eviction in Brooklyn Housing Court. He researched and wrote a motion for a stay, which our adversary took months to respond to and which the Judge has still not ruled on, resulting in the eviction case having been paused for eight months already, r crucial time during which our client is stably housed.

Mr. Connolly took on several other complex matters. He visited a client's apartment, researched and wrote pleadings for a rent overcharge case, and prepared a petition for a lawsuit against a landlord who severely harassed the tenant. He connected with clients with a high degree of empathy and a willingness to engage in challenging research and writing to defend their rights. Mr. Connolly is a dedicated student with a deep interest in using the law to advance social justice. He was willing to go the extra mile to understand all aspects of a case, which would enable him to produce sophisticated analysis and writing. If you need further information, please do not hesitate to contact me.

Very truly yours,

Julia McNally

Julia McNally
Attorney-in-Charge, Queens Neighborhood Office
The Legal Aid Society
Adjunct Clinical Professor
NYU School of Law

Justice in Every Borough.

New York University
A private university in the public service

School of Law

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Randy Hertz
Vice Dean
Fiorello LaGuardia Professor of Clinical Law

June 12, 2023

RE: Sean Connolly, NYU Law '24

Your Honor:

I am writing to recommend Sean Connolly for a clerkship.

In the Fall 2021 semester, Sean was in my 1L Criminal Law course. He received an A in the course. His exam answers earned the second highest score in the class. He did an outstanding job of analyzing the issues and drawing on the course material to address them in an incisive and comprehensive manner.

In class and in office hours sessions, Sean made highly perceptive comments. His comments enriched the sessions and often resulted in our addressing additional, important aspects of the subjects under discussion.

I believe that Sean's intelligence, analytic skills, and excellent judgment would make him a first-rate law clerk.

Respectfully,

Randy Hertz

Note:

The following is a research memo I produced during my first-year summer internship at Northern Manhattan Improvement Corporation (NMIC). My supervisor worked with several rent-stabilized clients who were temporarily staying in rehabilitation facilities and were facing eviction on the basis of nonprimary residence. The memo focuses heavily on First Department precedent, as NMIC practices exclusively within the First Department. I edited this writing sample slightly after the end of my internship, but I made all edits myself without any external feedback. I have received permission from NMIC to use this memo as a writing sample.

Medical Excuses for Absence in Non-Primary Residence Cases in Rent-Stabilized Apartments

QUESTION PRESENTED

Can a rent-stabilized tenant be evicted for failing to maintain their rent-stabilized apartment as their primary residence when they are absent from that apartment for the purpose of receiving medical, psychiatric, or geriatric care?

BRIEF ANSWER

A rent-stabilized tenant cannot be evicted for failing to maintain their apartment as their primary residence *only* because they have been absent from the apartment to receive medical, psychiatric, or geriatric care, but a landlord may present evidence other than the absence itself to show that such a tenant has abandoned the apartment as their primary residence or that the tenant has failed to maintain a sufficient connection to their apartment.

DISCUSSION

I. Legal Background

A landlord may refuse to offer a renewal lease to a rent-stabilized tenant—and may subsequently recover possession of the rent-stabilized premises—if the tenant of record does not maintain the apartment as their "primary residence." 9 NYCRR § 2524.4; *TOA Constr. Co. v. Tsitsires*, 861 N.Y.S.2d 335, 337 (1st Dept 2008) ("The Rent Stabilization Code permits a landlord to recover possession of a rent-stabilized apartment that is not occupied by the tenant . . . as his or her primary residence.") (internal quotations omitted).

"Primary residence" has been defined by the First Department to mean "an ongoing, substantial, physical nexus with the controlled premises for actual living purposes." *Katz Park Ave. Corp. v. Jagger,* 11 N.Y.3d 314, 317 (2008); *citing Emay Properties Corp. v. Norton*, 519 N.Y.S.2d 90 (App Term 1st Dept 1987); *see also 542 E. 14th St. LLC v. Lee,* 883 N.Y.S.2d 188 (1st Dept 2009). Other departments appear to have accepted this definition. *9 Richardson St., LLC v Deleon*, 2020 N.Y. Misc. LEXIS 8183 (App Term 2d Dept 2020) (applying the nexus definition of primary residence). The Rent Stabilization Code (RSC) provides factors which courts *may* consider in determining whether a tenant occupies a specific housing accommodation as their primary residence, but the code expressly says that no single factor is determinative. 9 NYCRR § 2520.6 (u). One factor listed by the RSC is the tenant's "occupancy of the housing accommodation for an aggregate of less than 183 days in the most recent calendar year, *except for temporary periods of relocation pursuant to section 2523.5(b)(2) of this Title*." 9 NYCRR § 2520.6 (u) (3) (emphasis added).

In turn, 9 NYCRR § 2523.5 (b) (2) lists reasons for absence from a rent-stabilized apartment which will not be deemed to interrupt the tenant's residency in the apartment. The list includes active military duty, enrollment as a full-time student, hospitalization for medical

treatment, and includes a catch-all category of "such other reasonable grounds." 9 NYCRR § 2523.5 (b) (2).

The First Department reads these provisions of the RSC as allowing the courts to make flexible, fact-specific determinations of "reasonable grounds" for absence from a rent-stabilized apartment; where the tenant has "reasonable grounds" for their absence, the absence is "excusable." *Second 82nd Corp. v. Veiders,* 37 N.Y.S.3d 208 (App Term 1st Dept 2016) ("[T]he Code allows the court to apply the flexible definition of . . . the other reasonable grounds clause of section 2523.5(b)(2) in determining whether a temporary absence is excusable.") (internal quotations omitted); *citing Lee*, 883 N.Y.S.2d 188.

The First Department applies this basic framework to both the rent stabilization and rent control contexts. A rent-controlled apartment may be decontrolled when the tenant of record has not occupied the apartment as their primary residence. NYCRR § 2200.2 (18). While the statutory schemes regulating rent stabilization and rent control are unique, the governing statutes define "primary residence" in nearly identical language. *Compare* 9 NYCRR § 2100.3 (j) *and* 9 NYCRR § 2520.6 (u) *with* 9 NYCRR § 2104.6 (d) (1) *and* 9 NYCRR § 2523.5 (b) (2). The First Department applies the judicially-constructed "physical nexus" definition of "primary residence" to both stabilized and controlled apartments. *Norton*, 519 N.Y.S.2d 90 (applying the physical nexus definition of primary residence in a rent-control case); *Lee,* 883 N.Y.S.2d 188 (citing *Norton* and applying the same definition of primary residence in a rent-stabilization case). As such, precedent in the rent-control context is relevant in determining the bounds of primary residence in the rent-stabilization context.

A. Impact of an Excusable Absence

When a tenant's absence from their rent-stabilized apartment is "excusable," the absence cannot serve as the *sole* basis for a finding that the tenant does not occupy the premises as their primary residence.

First Department precedent on this point is narrow: the relevant cases hold only that a tenant's temporary and excusable absence does not *mandate* a finding of nonprimary residence. *Veiders*, 2016 N.Y. Misc. LEXIS 1513 (tenant's excusable absence "did not mandate a finding of nonprimary residence); *Lee*, 883 N.Y.S.2d 188 (Upholding the civil court's finding that the tenant's excusable absence "did not, in and of itself, mandate a finding of nonprimary residence.").

This narrow language, however, fails to give full meaning to the text of the RSC. The RSC explains that no single factor shall be solely determinative when determining whether or not a specific housing accommodation is a tenant's primary residence. 9 NYCRR § 2520.6 (u). This language makes clear that, *regardless* of whether or not a tenant's absence from their apartment is excusable, that absence can *never* "mandate" a finding of nonprimary residence because no single factor mandates *any* specific outcome. Yet the RSC goes on, while listing factors which the court "may" consider in its primary residence analysis, to expressly carve out "temporary periods of relocation pursuant to section 2523.5(b)(2)." 9 NYCRR § 2520.6 (u) (3). If this language is to have any independent meaning, it must mean something *more* than that these temporary periods of relocation—that is to say, periods of excusable absence—do not "mandate" a finding of nonprimary residence. Read broadly, this language seems to say that the courts may not consider such excusable absences *at all* when determining primary residence—but no court seems to have taken this interpretation. A more narrow interpretation is that, at the very least,

some additional evidence must be introduced *besides* the fact of an excusable absence itself to justify a finding of nonprimary residence. This approach is supported by Civil Court precedent.

The Civil Courts have consistently held that excusable absences—including absences for medical, psychiatric, or geriatric care—cannot, *on their own*, establish that a regulated apartment is no longer the tenant's primary residence. *Edelstein LLC v. Connelly*, 2019 NYLJ LEXIS 2558, 5 (Civ. Ct., N.Y. Co. 2019) (noting that "admission to a hospital, rehab facility, or caregiver's home for medical reasons" does not "in and of itself, mean that the tenant's apartment is no longer his primary residence."); *Metroka v. Andrews*, 2006 N.Y. Misc. LEXIS 2854, 4 (Civ. Ct., N.Y. Co. 2006) ("[A] senior citizen's admission to a nursing home, health care center, rehabilitation facility or the like even for a relatively substantial period of time, is not a life sentence and does not automatically mean they have forfeited their primary residence at the familiar rent regulated apartment in which they may have resided for decades."); *90 Elizabeth Apt. LLC v Eng*, 64 N.Y.S.3d 486, 494 (Civ. Ct., N.Y. Co. 2017) ("[C]onfinement of a tenant with Alzheimer's disease to a nursing home is not, in and of itself, sufficient to prove that the tenant no longer occupies his or her home as a primary residence."); *Sofolarides v. Sofolarides*, 972 N.Y.S.2d 147 (Civ. Ct., Queens Co. 2017) ("The courts have held that being domiciled in a nursing home does not create a forfeiture of one's primary residence.").

The most reasonable reading of both the RSC and relevant Civil Court precedent is that an excusably absent tenant cannot be found to have ceased occupying their stabilized apartment as their primary premises *simply* because they have been excusably absent from the apartment. At the very least, additional evidence must be adduced *beyond the fact of the tenant's absence itself* to justify a finding that the tenant has failed to maintain their apartment as their primary residence.

However, the fact that the tenant's absence is excusable does not *preclude* a finding that the tenant no longer maintains the apartment as their primary residence. As noted above, the First Department defines "primary residence" as an ongoing, substantial, physical nexus with the controlled premises for actual living purposes. An excusably absent tenant must still maintain a substantial, physical nexus with the stabilized apartment during the course of their absence. *567th Ave., LLC v. Sobel*, 7 N.Y.S.3d 241 (Civ. Ct., N.Y. Co. 2014) (explaining that the tenant must show *both* that his absence was excusable *and* that he has maintained a substantial nexus to his regulated apartment); *Lee*, 883 N.Y.S.2d 188 (upholding the Civil Court's finding *both* that that tenant had a substantial nexus to the apartment *and* that her temporary absence from the apartment fell within the "other reasonable grounds" provision of the RSC).

The existence of an excusable absence simply *shifts* the court's nexus analysis: because the absence is excusable, the absence itself cannot serve as the sole basis for finding the nexus has been broken—but the courts will still seek to determine, through evidence *other* than the tenant's absence from the apartment, whether or not the tenant has maintained the requisite nexus with their regulated apartment.

B. Absences for Medical, Psychiatric, or Geriatric Care Are Excusable

As outlined above, absences from a regulated apartment for the purpose of receiving medical, psychiatric, or geriatric care are generally excusable—which is to say that such absences cannot, on their own, give rise to a finding of nonprimary residence. *567th Ave., LLC v. Sobel*, 7 N.Y.S.3d 241 ("It is well settled that where a tenant is an in-patient for medical or psychiatric treatment said absence is excusable for non-primary residence purposes."); *citing Katz v. Gelman*, 676 N.Y.S.2d 774 (App Term 1st Dept 1998) (tenant's period of institutionalization in residential facilities was an excusable absence); *WSC 72nd Owners LLC v.*

Bondy, 875 N.Y.S.2d 825 (App Term 1st Dept 2008) (tenant's "acknowledged involuntary absence for medical reasons" was excusable); *Connelly*, supra; *Andrews*, supra; *Elizabeth*, supra; *Sofolarides*, supra.

However, an otherwise excusable absence may *not* be excusable where the tenant either manifests a lack of intent to return to the premises, or where the tenant is actually unable to return to the premises. *Tsitsires*, 861 N.Y.S.2d 335, 337. In such cases, the tenant's absence itself may be used as evidence to demonstrate that the tenant lacks the necessary physical nexus with the stabilized apartment.

II. Analysis in Excusable Absence Cases

Where a rent-stabilized tenant has been absent from their apartment to receive medical, psychiatric, or geriatric care, the tenant will generally seek to establish that their absence was excusable. Such absences are generally excusable *unless* the tenant manifests a lack of intent to return to the premises or the tenant is unable to return to the premises.

If the tenant's absence is excusable, the court will still seek to determine whether or not the tenant has maintained a substantial physical nexus with the premises during the course of their absence.

When the tenant can successfully demonstrate both that their absence was excusable and that they maintained a substantial physical nexus to their apartment throughout the course of their absence, the court should find that the tenant has maintained the apartment as their primary residence.

A. Intent and Ability to Return to Rent-Stabilized Apartment

The courts distinguish between a temporary, excusable absence from a stabilized apartment and an abandonment of that apartment.

A tenant who manifests a lack of intent to return to their apartment, or who is actually unable to return to the apartment, may be deemed to have abandoned their apartment as their primary residence even if their absence may be otherwise excusable.

In *Tsitsires*, a tenant with severe mental illness rarely used his rent-stabilized apartment, often choosing to sleep outdoors. *Tsitsires*, 861 N.Y.S.2d 335. The First Department found that, despite the tenant's mental illness, his absence was not excusable because "there is no credible evidence indicating that respondent will ever return to and reside in the subject premises, or even that he has any intent to do so." *Id*. The court distinguished the facts of the case from previous cases in which tenants had been found to be excusably absent because, in those prior cases, the tenants had "fully intended to return to and reside in the apartment as soon as practicable." *Id*. Similarly, in *Manhattan Transfer, L.P. v. Quon*, 953 N.Y.S.2d 550 (App Term 1st Dept 2012), the Appellate Term upheld the trial court's finding that the tenant's relocation to an assisted living facility was an abandonment of her rent-controlled apartment, not an excusable absence, noting that the tenant "did not evince an intent to resume occupancy at any time prior to the service of landlord's termination notice."

These cases imply that an absent tenant must demonstrate *some* level of intent to return to their regulated apartment in order to maintain that apartment as their primary residence. But it is not entirely clear *how* the court will determine that intent. In practice, determination of the tenant's intent appears to mirror the analysis of whether or not the tenant has maintained a substantial nexus with the apartment (see below for discussion of the substantial nexus analysis). For example, in one Civil Court case, the court referenced a single set of factors in support of its ultimate conclusion both that the tenant intended to return to her apartment and that she had

maintained a substantial physical nexus to her apartment. *Brg 321 LLC v. Dimattia*, 2015 NYLJ LEXIS 589 (Civ. Ct., N.Y. Co. 2015).

Regardless of the tenant's intent, a court may find that an absent tenant has abandoned their apartment as their primary residence when the tenant appears physically or mentally incapable of resuming occupancy of the apartment. *Connelly*, 2019 NYLJ LEXIS 2558 (finding that the tenant had given up his apartment as his primary residence *only* at the point at which he "was probably physically unable to return to the apartment," but *not* during his prior "physical absences for medical treatment."); *Tsitsires*, 861 N.Y.S.2d 335 ("Nothing in the record supports a conclusion that respondent had any true intent or ability to achieve a cure for his illness that would allow him to take up real residence in the apartment.").

When the tenant's ability to return to their apartment is questioned, the tenant may need to introduce medical evidence to show that they will most likely be able to return to their apartment, or at the very least to show that they have a non-negligible possibility of returning. The court may consider, in light of any medical evidence, whether the tenant's stay in a long-term care facility appears permanent or temporary. *L.J.M. Venture No. 1 v. Joy*, 432 N.Y.S.2d 58, 61 (Sup. Ct., N.Y. 1980) ("A move to a nursing home may, in a given instance, betoken a short convalescence from an illness, or it may signal in the case of an elderly and infirm patient a permanent relocation and an end to a self-supporting life-style… expert medical testimony bearing on the patient's ability to leave the nursing home may have to be evaluated."). However, the tenant's failure to produce documentary medical evidence is not dispositive, especially when there is credible personal testimony in support of the tenant's position. *200 E. 62nd Owner LLC v Grafstein*, 2020 N.Y. Misc. LEXIS 312 (App Term 1st Dept 2020).

Where medical evidence establishes that the tenant will most likely be able to return to their apartment, and the tenant manifests an intent to return to their apartment when able, the tenant should not be found to have abandoned their apartment. *Schultz v. Gomez*, 1995 NYLJ LEXIS 9785 (Civ. Ct., N.Y. Co. 1995) (doctor testified that "he could not see any medical reasons why [tenant] should not be able to leave the nursing home after 6 to 8 weeks of rehabilitation," and this testimony was not contradicted by the landlord); *Gruber*, 518 N.Y.S.2d 920 (tenant presented medical testimony that she "can function normally at home with a full-time home attendant," and presented evidence that she would be able to secure full-time care through Medicaid).

The medical evidence presented by the tenant need not be definitive, and a tenant can prevail in a non-primary residence case even when it is uncertain if they will be able to return to their apartment. *Heller v. Joy*, 1984 N.Y. Misc. LEXIS 3799 (Sup. Ct., N.Y. 1984) (finding for tenant even where medical evidence reflected "an uncertain prognosis as to the eventuality of the tenant's return."); *65 Cent. Park West, Inc. v. Greenwald*, 486 N.Y.S.2d 668 (Civ. Ct., N.Y. Co. 1985) (denying summary judgment for landlord where a doctor's note indicated the tenant "may be able to return to her home with the assistance of a skilled aide," and leaving it for trial to determine if the possibility of return "is imminent or so remote that it could be said that it is not a possibility at all.").

The tenant's actual resumption of occupancy of their apartment is highly persuasive, though not determinative. The resumption of occupancy need not be permanent; the tenant's case will be strengthened if they occasionally return to the apartment during the course of a prolonged stay at a care facility. *Schultz*, 1995 NYLJ LEXIS 9785 (tenant returned to her apartment overnight around 20 to 30 times per year; this "pattern of visitation" was "indicative of

respondent's intention to maintain a continuing relationship to the apartment."). The tenant's resumption of full-time occupancy in their apartment at the time of the litigation is strongly supportive of a finding that the apartment remains the tenant's primary residence. *Gelman*, 676 N.Y.S.2d 774 (court viewed the tenant's institutionalization for psychiatric treatment as an excusable absence "where the institutionalization was transitory, not permanent in nature; where there was no abandonment of the premises or establishing of any new residence; and where a resumption of occupancy has taken place."); *Bondy*, 875 N.Y.S.2d 825 (citing *Gelman* and noting that the tenant had resumed occupancy of the apartment).

However, resumption of occupancy is only compelling evidence when combined with a reasonable excuse for absence; the court may disregard the tenant's resumption of occupancy when it finds that the initial absence was not excusable. *20 Fifth Ave. LLC v Wertheimer*, 999 N.Y.S.2d 798 (Civ. Ct., N.Y. Co. 2014) (noting that tenant's resumption of occupancy in the apartment and maintenance of possessions in the apartment weighed in her favor, but that the tenant's absence was not excusable because it was not "in any way… mandated for medical treatment" but rather based on the tenant's desire to live with her partner).

B. Physical Nexus During the Course of Tenant's Absence

Where the tenant establishes that they have been excusably absent from their stabilized apartment, the courts will look for evidence *besides* the tenant's actual presence in the apartment to determine whether or not the tenant has maintained an ongoing, substantial, physical nexus with the controlled premises for actual living purposes.

Courts look at a range of factors when attempting to identify the existence or lack of this nexus. Common factors include whether the tenant has kept their possessions in the apartment, whether the tenant continues to list the apartment as their residence on official documents,

whether they continue to receive mail at the apartment, and whether they have sublet the apartment. Of these factors, only the listing of the premises on official documents and subletting of the apartment are expressly listed by the RSC; the other factors have been judicially imposed.

As one may expect, when these factors point in the tenant's direction, the court is likely to find that the tenant has maintained the necessary nexus to their apartment and that the apartment remains their primary residence. *Deleon*, 2020 N.Y. Misc. LEXIS 8183 (tenant established a sufficient nexus with her apartment because she listed the apartment on official documents, received mail at the apartment, kept her possessions in the apartment, and never sublet the apartment); *Grafstein*, 2020 N.Y. Misc. LEXIS 312 (finding for a tenant who maintained all of her personal belongings in the subject apartment during her medical absence, received her mail there and did not sublet the apartment); *Bondy*, 875 N.Y.S.2d 825 (finding for tenant who maintained furniture and personal belongings in the apartment, received mail there, and regularly returned to the apartment during her medical absence).

Where the above factors point against the tenant, the court is likely to find the tenant has not maintained the premises as their primary residence. As noted above, this analysis can bleed into the determination of whether or not the tenant has an excusable absence from their apartment. If a tenant is absent from their premises for the purpose of receiving medical, psychiatric, or geriatric care, and if most of the above-listed factors point in the tenant's direction, the court is likely to find *both* that the tenant's absence is excusable *and* that the tenant has maintained a sufficient nexus with their apartment. But if the above factors point against the tenant, the court is likely to find *both* that the tenant's absence is not excusable *and* that the tenant has not maintained a sufficient nexus with their apartment. *Quon*, 953 N.Y.S.2d 550 (Tenant's absence was not excusable and tenant had not maintained her apartment as her primary

residence when she had received mail at her nursing home, listed the nursing home on official documents, and had emptied her apartment of belongings; the apartment was used as storage by the tenant's brother and the brother paid rent and utilities).

CONCLUSION

A rent-stabilized tenant cannot be evicted on the grounds of non-primary residence simply because they have been absent from their apartment for the purpose of receiving medical, psychiatric, or geriatric care as long as the tenant manifests an intention to return to the apartment when able and the tenant is reasonably likely to regain the ability to return to the apartment. To justify a finding that the tenant no longer uses the apartment as their primary residence, the landlord must show, using evidence *besides* the simple fact of the tenant's absence, that the tenant has failed to maintain a physical nexus to their apartment. If the tenant can establish that their absence was for the purposes of receiving medical, psychiatric, or geriatric care, that they have maintained a physical nexus with the apartment, that they have maintained an intent to return to the apartment when able, and that they are actually capable or at least have a plausible possibility of resuming occupancy of their apartment, the courts should find that the rent-stabilized apartment remains the tenant's primary residence.

Applicant Details

First Name	**William**
Middle Initial	**Seth**
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Contact Phone Number	**8177130574**

Applicant Education

BA/BS From	**University of Arkansas-Fayetteville**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Texas School of Law** **http://www.law.utexas.edu**
Date of JD/LLB	**May 6, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Texas Review of Litigation**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**